Supreme Court, U.S.
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No. -

# In The
# Supreme Court of the United States

AMERICAN ROAD & TRANSPORTATION BUILDERS ASS'N,
PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
RESPONDENTS.

**On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit**

## PETITION FOR WRIT OF *CERTIORARI*

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## QUESTIONS PRESENTED

For judicial-review statutes such as Clean Air Act Section 307(b)(1), 42 U.S.C. §7607(b)(1), that provide a 60-day window within which to petition for review of final agency action directly in a court of appeals and that limit further review to after-arising grounds, do such statutes provide jurisdiction for courts to hear petitions for review filed within 60 days of agency denials of rulemaking petitions under 5 U.S.C. §553(e), as distinct from jurisdiction for only those petitions filed within 60 days of the arising of some new information?

Whether re-promulgating a rule in its entirety "reopens" the rule to judicial review?

Whether a prior holding that a notice of proposed rulemaking mooted unreasonable-delay and constructive-denial claims on an administrative petition has preclusive effect on the issue of whether the agency reopened the rule sufficiently to reopen judicial review?

If issue preclusion otherwise would reopen judicial review, whether the court of appeals – as distinct from district courts under Clean Air Act §304(a)(2), 42 U.S.C. §7604(a)(2) – have jurisdiction for such unreasonable-delay claims?

Whether three-judge panels are bound by the earlier decision in an intra-circuit split in authority?

## PARTIES TO THE PROCEEDING

Petitioner American Road & Transportation Builders Association ("ARTBA") is a District of Columbia nonprofit trade organization with more than 5,000 members from all sectors and modes of the transportation construction industry (including without limitation roads, public transit, airports, ports, and waterways) and represents the collective interests of the U.S. transportation construction industry before the national executive, legislative, and judicial branches of government.

Respondents are the federal Environmental Protection Agency and its Administrator Lisa Jackson in her official capacity, as well as the interveners in the court of appeals: the Association of American Railroads, a railroad trade association; South Coast Air Quality Management District, an air-pollution control agency for the Los Angeles area; California Air Resources Board, the California state air-pollution control agency; and Natural Resources Defense Council, an environmental advocacy group.

Pursuant to this Court's Rule 29.6, petitioner ARTBA states that it is a non-profit trade organization and that no publicly held company owns any interest in it.

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## PETITION FOR WRIT OF *CERTIORARI*

The American Road & Transportation Builders Association ("ARTBA") respectfully petitions this Court to issue a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit that §307(b)(1) of the federal Clean Air Act ("CAA"), 42 U.S.C. §7607(b)(1), and the All Writs Act, 28 U.S.C. §1651(a), do not provide jurisdiction for ARTBA's petition for review of either the preemption rules promulgated by the Environmental Protection Agency ("EPA") or EPA's denial of ARTBA's administrative petition to amend or repeal provisions of those EPA preemption rules.

## OPINIONS BELOW

The court of appeals' decision is reported at 588 F.3d 1109 and reprinted in the Appendix ("App.") at 1a. ARTBA's petition for review in the court of appeals sought review of two final EPA actions announced in the *Federal Register* on October 8, 2008, 73 Fed. Reg. 59,034, 59,130 (2008), and reprinted in pertinent part in the Appendix at 88a (final rule) and 22a (petition denial).

## JURISDICTION

The court of appeals issued its decision on December 11, 2009, and denied timely petitions for reconsideration and rehearing *en banc* on March 5, 2010 (orders reprinted at App. 16a and 17a, respectively). Under ARTBA's view of the law, the court of appeals had jurisdiction under 42 U.S.C. §7607(b)(1) and 28 U.S.C. §1651(a). This Court has jurisdiction under 28 U.S.C. §1254(1).

## AUTHORITIES INVOLVED

The Appendix quotes Administrative Procedure Act §4(e), 5 U.S.C. §553(e), the All Writs

Act, 28 U.S.C. §1651(a), and CAA §307(b), 42 U.S.C. §7607(b), as well as CAA §110(a)(2)(E)(i) and §209, 42 U.S.C. §§7410(a)(2)(E)(i), 7543, PUB. L. NO. 108-199, §428, 118 Stat. 3, 418-19 (2004) (hereinafter, the "Bond Amendment"), and relevant provisions from EPA's implementing rules.

The authorities fall into four primary areas:

1. ***Administrative Rulemaking Petitions.*** In 1946, Congress authorized the public to petition agencies to amend or repeal a rule, 5 U.S.C. §553(e), as part of the Administrative Procedure Act, PUB. L. NO. 79-404, 60 Stat. 237 (1946) ("APA"). As explained *infra*, judicial review of the denial of such petitions (as distinct from the original rule) can "reopen" the time for challenging agency rules where the statute of limitations has run on direct challenges to the underlying rule.

2. ***CAA Judicial Review.*** In 1970, Congress applied the precursor of current §307(b) to judicial review of a subset of EPA action, PUB. L. NO. 91-604, §12(a), 84 Stat. 1676, 1707 (1970), which the 1977 amendments expanded to apply to most final EPA action. PUB. L. NO. 95-95, §305(c)(1)-(3), 91 Stat. 685, 776 (1977). CAA §307(b)'s central provisions are (a) direct review in the courts of appeal; (b) review of nationally applicable actions exclusively in the D.C. Circuit, with review of regionally applicable actions in the court of appeals for the relevant circuit; and (c) the jurisdictional requirement to petition for review in the relevant court of appeals within 60 days of EPA's publishing notice of its action in the *Federal Register* or within 60 days of after-arising grounds. 42 U.S.C. §7607(b)(1). In addition, §307(b)(2) prohibits courts from reviewing in an enforcement proceeding any EPA action for which

review could have been had under §307(b)(1). 42 U.S.C. §7607(b)(2).[1]

3. ***CAA Preemption.*** In 1967, Congress first introduced CAA preemption for onroad vehicular emission standards, with an exception for California. PUB. L. NO. 90-148, §208, 81 Stat. 485, 501 (1967); *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 541 U.S. 246 (2004) ("*EMA v. SCAQMD*"). The 1970, 1977, and 1990 amendments modified CAA's onroad preemption *inter alia* to allow other states to adopt California's vehicular-emission program and to prohibit state regulation of federally regulated components during the federally regulated useful life. 42 U.S.C. §§7507, 7543(e). In 1990, Congress introduced parallel provisions for CAA preemption of *nonroad* vehicular emission standards and other requirements. PUB. L. NO. 101-549, §222(b), 104 Stat. 2399, 2502 (1990). Significantly, §209(e)(1) preempts all states, *including California,* from adopting or enforcing emission-related standards or other requirements for new farm and construction equipment under 175 horsepower and new locomotives. 42 U.S.C. §7543(e)(1). In 2004, Congress enacted the Bond Amendment, which (among other things) reinforces the breadth of the "standards and other requirements" language. PUB. L. NO. 108-199, §428(e), 118 Stat. at 418-19. Procedural thresholds aside, this litigation concerns the scope of §209(e)'s nonroad preemption.

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[1] Before 1977, §307(b)(1) provided 30 days. PUB. L. NO. 91-604, §12(a), 84 Stat. at 1707. For consistency, ARTBA refers to §307(b)(1)'s window as having 60 days throughout the petition.

4. ***CAA Implementation Plans.*** In 1970, Congress introduced state implementation plans ("SIPs") for attaining the national ambient air quality standards ("NAAQS"), where states model the emission reductions needed to attain the NAAQS and then develop SIP control measures to provide those emission reductions. *See* 42 U.S.C. §7410. As relevant here, the principal requirement for a SIP measure is that the state have authority to enforce it. 42 U.S.C. §7410(a)(2)(E)(i). Obviously, state rules that §209(e) preempts cannot meet this criterion for EPA approval of a SIP measure.

## STATEMENT OF THE CASE

As the success of onroad vehicular standards shows, regulators can most efficiently and equitably impose vehicular controls at the manufacturing stage, with costs spread across the entire market and incurred by purchasers incrementally as fleets expand or turn over. Certainly, new-vehicle preemption does not end the instant vehicles leave the showroom, subjecting owners to regulation by all 50 states and countless political subdivisions. Against that backdrop, this litigation raises four substantive issues on §209(e)'s preemptive scope:

(1) Whether §209(e) preempts fleetwide averaging, early retirement, and purchase-sale requirements (collectively, "Fleet Rules")?

(2) Whether §209(e) preempts restrictions on the use, hours of operation, and fuel of both new and non-new nonroad vehicles (collectively, "In-Use Controls")?

(3) Whether §209(e)(1)'s uniform treatment of new locomotives vis-à-vis new construction and farm equipment under 175 horsepower

allows EPA's preferential treatment of locomotives vis-à-vis construction and farm equipment under 175 horsepower?

(4) Whether a "market participant" exception limits §209(e)'s preemption and, if so, the scope of that exception?

At this juncture, the primary questions presented are jurisdictional. Nonetheless, the underlying substantive issues both relate to jurisdiction and help understand the procedural setting.

On July 12, 2002, ARTBA administratively petitioned EPA to amend or repeal EPA's nonroad preemption rules on the first three issues (*i.e.*, #1 through #3 above). *See* Court of Appeals Joint Appendix ("CAJA") at 82-94. In 2004, EPA and ARTBA exchanged correspondence on the impact of the Bond Amendment and this Court's ruling in *EMA v. SCAQMD* on ARTBA's petition.

On March 29, 2006, ARTBA petitioned the D.C. Circuit for review under §307(b)(1) and the All Writs Act against EPA's inaction as unreasonable delay and constructive denial. *ARTBA v. EPA*, No. 06-1112 (D.C. Cir. filed Mar. 29, 2006). ARTBA filed that petition for review within sixty days of Texas' renewed consideration of nonroad rules on February 6, 2006. Declaration of Jed Anderson, *ARTBA v. EPA*, No. 06-1112 (D.C. Cir.), at ¶9. During that action, ARTBA's dispute over California's nonroad regime ripened, and (again within 60 days) ARTBA advised the D.C. Circuit of that development. *ARTBA v. EPA*, Declaration of Lawrence J. Joseph,

No. 06-1112 (D.C. Cir.), at ¶6; Motion for Judicial Notice, *ARTBA v. EPA*, No. 06-1112 (D.C. Cir.).[2]

On May 18, 2007, EPA issued a notice of proposed rulemaking ("NPRM") that included ARTBA's petition and also proposed to re-promulgate the entirety of EPA's preemption rules. 72 Fed. Reg. 28,098, 28,209-10 (2007) (App. 18a-21a). One month before the date of the oral argument, EPA moved to dismiss ARTBA's prior action as moot because "EPA has now commenced a rulemaking on the issues ARTBA raised." App. 109a. The D.C. Circuit granted that motion, App. 115a, over ARTBA's objection that the NPRM did nothing. App 113a.

In its comments on EPA's NPRM, ARTBA covered not only its three petition issues but also an additional issue (issue #4 above) that arose after ARTBA filed its administrative petition. CAJA at 160, 170-73.[3] On October 8, 2008, EPA promulgated its final rule (which incorporated EPA's response to ARTBA's petition) to deny relief on all four issues. 73 Fed. Reg. at 59,130 (App. 91a); CAJA at 287-89 (App. 103a-106a). ARTBA filed this litigation within 60 days of EPA's notice in the *Federal Register*.

For eight years then, ARTBA has attempted to resolve EPA's inconsistencies. After five years of

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[2] ARTBA filed copies of these documents in the D.C. Circuit in this action and will seek leave to lodge copies here. *See* S. CT. RULE 32.3.

[3] Because ARTBA's NPRM comments raised an issue beyond ARTBA's administrative petition, the Court would need to resolve ARTBA's rulemaking-based arguments for reopener (Sections II and III, *infra*) even if the Court accepts ARTBA's petition-reopener argument (Sections I and IV, *infra*).

inaction and within 60 days of after-arising information, ARTBA petitioned the D.C. Circuit for review, but that court held that EPA's NPRM mooted ARTBA's challenge. In a reversal that "borders on the Kafkaesque," *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 557 (1978), the D.C. Circuit now says EPA's NPRM did nothing, App. 13a, and ARTBA must "petition" – the panel cannot say whether that means *petition for review* in court or *petition EPA* administratively – within 60 days of after-arising information. App. 9a-11a.

**Factual Background**

A construction company's value and ability to do its work depend on its employees and equipment. Beyond the obvious and essential roles of employees and equipment, companies use existing equipment as assets against which not only to borrow to purchase new equipment but also to meet their obligations to bond their work. State measures allowed by EPA but prohibited under ARTBA's interpretation of §209(e) threaten both the employees and the equipment of ARTBA's members. Moreover, because states must adopt new SIP control measures for each new SIP deadline and whenever EPA lowers a NAAQS, even past fights where ARTBA prevailed provide only temporary relief. Either the states themselves re-raise these measures or environmental plaintiffs seek to compel the states to adopt them at the next SIP deadline. Only definitive answers on §209(e)'s scope will end the serial regulatory uncertainty.

In Texas, ARTBA has fought morning construction bans, which seek to shift emissions later in the day so they "bake" less in the sun and blow away at night. These measures would deny employees the ability to spend evenings – much less

afternoons – with their families, changing a way of life and driving invaluable people from the industry.

In California (and states that adopt California standards), ARTBA members face a perversely perfect storm that requires expensive new equipment *and* expensive, unsafe, untested, stop-gap retrofits, while (a) prohibiting use of existing equipment on projects, (b) depressing existing equipment's market value and thus the borrowing capacity to meet new costs, (c) decreasing the capacity to bond projects and thus to earn income to bear new costs, and (d) requiring layoffs that further reduces the capacity to earn income to bear new costs. Even without the worst economy since the Great Depression, this would be an existential fight for survival.

**Statutory Background**

Although this litigation ultimately concerns the preemptive scope of CAA §209(e), the jurisdictional question turns on the relation between APA §4(e) and CAA §307(b) for purposes of judicial review of EPA actions. 5 U.S.C. §553(e); 42 U.S.C. §7607(b). This section summarizes the two sections and the litigation that interprets them.

As indicated, §553(e) authorizes petitioning agencies to amend, repeal, or promulgate a rule. 5 U.S.C. §553(e). Within the APA, "[§553(e)] *is of the greatest importance* because it is designed to afford every properly interested person statutory authority to petition for the issuance, amendment, or repeal of a rule." *Administrative Procedure Act: Legislative History*, S.Doc. No. 79-248, at 359 (1946) (emphasis added) (hereinafter "*APA Leg. Hist.*"). "The right of petition is written into the Constitution itself," and "[§553(e)] confirms that right where Congress has delegated legislative powers to administrative

agencies." *Id.* "Even Congress, under the Bill of Rights, is required to accord the right of petition to any citizen," and "a petitioner [who] states and supports a valid ground for ... relief, manifestly [is] entitled to ... relief." *Id.* at 21.

The §553(e) petition process bears particular importance where direct challenges to an underlying rule are untimely. In such cases, the agency's response to the petition provides a new final agency action for which the petitioner can seek judicial review. *See* App. 6a-7a; *Investment Co. Inst. v. Bd. of Governors, Fed'l Reserve Sys.*, 551 F.2d 1270, 1280-81 (D.C. Cir. 1977) ("*Investment Co.*"); *Baltimore Gas & Elec. Co. v. ICC*, 672 F.2d 146, 149-50 (D.C. Cir. 1982) ("*BGE*"). ARTBA refers to this as the "petition-reopener" doctrine to distinguish instances where rulemakings reopen review, without a prior petition.

In several post-APA statutes, Congress has included limitations on review like those found in §307(b), which require filing a petition for review in court within a short period – usually 30 to 90 days – and limit subsequent review to after-arising grounds:

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the *Federal Register*, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. §7607(b)(1); *see also* 30 U.S.C. §1276(a)(1) (Surface Mining Control & Reclamation Act or "SMCRA"); 42 U.S.C. §300aa-32 (National Childhood Vaccine Injury Act); 42 U.S.C. §6976(a)(1) (Resource

Conservation & Recovery Act); 42 U.S.C. §300j-7(a)-(b) (Safe Drinking Water Act); 42 U.S.C. §4915(a) (Noise Control Act).

In *Olijato Chapter, Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975) ("*Navajo Tribe*"), the D.C. Circuit addressed the interplay between §553(e) and §307(b)(1). There, the Tribe sought to challenge an EPA rule outside §307(b)(1)'s window, but based on after-arising information. The Tribe had filed suit in district court and, based on that court's determining it lacked jurisdiction, also filed a belated petition for review in the court of appeals. 515 F.2d at 658-59. *Navajo Tribe* held that – in order to present such information to EPA in a manner that the court of appeals could review – one first must petition EPA under §553(e). 515 F.2d at 666. In broadening §307(b)'s scope in the 1977 amendments, Congress ratified the *Navajo Tribe* approach. H.R. REP. 94-1175, 264 (1976); S. REP. 95-294, 323 (1977). In addition, Congress rejected *dicta* from *Investment Co.* that would allow avoiding §307(b)'s time bar for "an undefined legitimate excuse." S. REP. 95-294, at 322. By negative implication, Congress did not reject the *Investment Co.* holding that such petitions are *required* for a party to challenge a rule that it lacked a ripe claim to challenge within the 60-day window.

In *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345 (D.C. Cir. 1995) ("*National Mining*"), the D.C. Circuit addressed SMCRA's similar language, which the court found to prohibit use of the petition-reopener doctrine. 70 F.3d at 1351. Although *National Mining* recognized that CAA's judicial review resembles SMCRA's, *National Mining*, 70 F.3d at 1350 n.2, neither that panel nor the *National*

*Mining* parties even mentioned (much less considered) *Navajo Tribe* as Circuit precedent.[4]

**Regulatory Background**

In initially promulgating rules to implement §209(e), EPA split non-locomotive nonroad vehicles from locomotives, and promulgated a narrow definition of preemption for the former, 59 Fed. Reg. 36,969, 36,973 n.8 (1994), which EPA defended in *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1093-94 (D.C. Cir. 1996) ("*EMA v. EPA*"). Two years later, EPA adopted broad preemption for locomotives, including in-use fleet standards. 63 Fed. Reg. 18,978 (1998). Locomotives' absence in *EMA* enabled EPA to argue that its rules "harmonized" the statute, *EMA v. EPA*, 88 F.3d at 1087, without addressing the clanging discord from longstanding locomotive preemption. *Napier v. Atlantic Coast Line*, 272 U.S. 605, 611-13 (1926). Whether by design or chance,

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[4] *See National Mining*, 70 F.3d at 1347-53; *National Mining*, No. 94-5351 (D.C. Cir.), Brief of Appellants Interstate Mining Compact Commission, 1995 WL 17204298 (Jul. 08, 1995); *id.*, Brief of Appellants National Mining Association, *et al.*, 1995 WL 17204297 (Jul. 28, 1995); *id.*, Brief for the Federal Appellees, 1995 WL 17204299 (Aug. 01, 1995); *id.*, Brief of Appellees National Wildlife Federation, *et al.*, 1995 WL 17204300 (Aug. 28, 1995); *id.*, Reply Brief of Appellants National Mining Association, *et al.*, 1995 WL 17204304 (Sep. 11, 1995); *id.*, Reply Brief of Appellants Interstate Mining Compact Commission, 1995 WL 17204305 (Sep. 11, 1995); *id.*, Supplemental Brief of Appellants National Mining Association, *et al.*, 1995 WL 17204301 (Oct. 23, 1995); *id.*, Supplemental Brief of Appellant Interstate Mining Compact Commission, 1995 WL 17204302 (Oct. 23, 1995); *id.*, Supplemental Brief for the Federal Appellees, 1995 WL 17204303 (Oct. 23, 1995).

EPA's 1994 rulemaking resolved only part of §209(e) (non-locomotives), without considering the remainder (locomotives) that renders the rulemaking untenable.

For non-locomotive nonroad vehicles and engines, EPA determined that new vehicles and engines lose preemption when they leave the showroom floor, 40 C.F.R. §85.1602 (1995); *accord* 40 C.F.R. §1074.5 (current version), but otherwise merely restated the statute. 40 C.F.R. §85.1603 (1995); *accord* 40 C.F.R. §1074.10 (current version). EPA also opined that "states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuels." 40 C.F.R. Pt. 89, subpart. A, App. A. After successfully defending that narrow interpretation, EPA adopted locomotive rules that expressly preempt "fleet average standards," 40 C.F.R. §85.1603(c)(2) (1995); *accord* 40 C.F.R. §1074.12(b) (current version), backdate locomotive "newness" to 1972, and extend it perpetually, 40 C.F.R. §§85.1602, 92.2 (1995) (newness-based preemption extends 1.33 times an engine's useful life and perpetually via remanufacturing); *accord* 40 C.F.R. §§1074.5, 1033.901 (same under current version).

Of the four issues that ARTBA seeks to raise, *EMA v. EPA* addressed only one (In-Use Controls.) *EMA v. EPA*, 88 F.3d at 1093-94, notwithstanding that the petitioner lacked standing on that issue. ARTBA's three other issues arose after *EMA v. EPA*. Specifically, EPA's disparate treatment, vis-à-vis locomotives, came in 1998, not 1994, and ARTBA's first exposure to preempted state rules purportedly allowed by EPA's §209(e) rules came two year later,

in Texas. 25 Tex. Reg. 4059, 4073 (2000); 25 Tex. Reg. 4080, 4101 (2000). ARTBA successfully challenged those Texas rules in district court. *Engine Mfrs. Ass'n v. Huston*, 190 F.Supp.2d 922 (W.D. Tex. 2001), and Texas repealed them while that ruling was on appeal, 26 Tex. Reg. 6935, 6936-37 (2001).

In 2002, after the Fifth Circuit vacated *Huston* as moot, ARTBA petitioned EPA under §553(e) to amend its preemption rules. CAJA at 82-94. Since 2004, ARTBA argued that the Bond Amendment and *EMA v. SCAQMD* support ARTBA's preemption views. The market-participant issue surfaced in 2005, after remand of this Court's decision in *EMA v. SCAQMD*. In response to EPA's NPRM, ARTBA raised all of these issues, CAJA 160, 170-73, and EPA's final rule and petition response denied all relief. App. 91a, 103a-106a.

## REASONS TO GRANT THE WRIT

The writ of *certiorari* should be granted both to resolve splits among the courts of appeals and to exercise this Court's supervisory authority in matters of importance both to CAA's judicial review and to the lower courts' exercise of their authority:

1. In 1975, the D.C. Circuit held that CAA review based on after-arising information required the petitioner first to petition EPA administratively under §553(e) and, only after failing there, to file a timely petition for review under §307(b)(1). *Navajo Tribe*, 515 F.2d at 666. Because so many circuits adopted the D.C. Circuit's *Navajo Tribe* holding on CAA petition-denial jurisdiction for after-arising grounds under §307(b), the D.C. Circuit's about face in this case splits with half of the other circuits, as well as controlling D.C. Circuit precedent and

legislative history. *See* Section I.C, *infra*. The Eighth Circuit supports petition-reopener jurisdiction even more strongly than *Navajo Tribe*. *Id.* Further, although ARTBA cares little about SMCRA beyond its indirect impact here, this Court's resolution of this case also would resolve a split between the Fourth and D.C. Circuits on the availability of petition-denial review under SMCRA. *Id.* Finally, because the All Writs Act protects the D.C. Circuit's *prospective* jurisdiction over nationally applicable CAA rules, this case conflicts with authority from the D.C., Ninth, and Eleventh Circuits under the All Writs Act. *See* Section I.D, *infra*.

2. Regardless of whether the court of appeals had jurisdiction over ARTBA's petition-denial claim, §307(b)(1) plainly provides jurisdiction to review the final preemption rules that EPA adopted in its 2008 rulemaking. *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987) ("*BLE*"); *Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984). The panel decision splits with several other circuits, which allow review when a new agency action reaffirms the old one and deny review only where the putative plaintiff seeks judicial review outside the proposed regulatory text or action. *See* Section II, *infra*.

3. Even assuming *arguendo* that EPA's 2008 rulemaking would not reopen the entirety of EPA's preemption rules, issue preclusion prevents EPA from arguing that here because EPA successfully argued the opposite in ARTBA's prior unreasonable-delay litigation. Because collateral estoppel applies to the federal government, *Montana v. U.S.*, 440 U.S. 147, 154-55 (1979), that prior holding binds EPA now, even if it was erroneous then. *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 699 (5th Cir. 1963) ("whether

right or wrong, [jurisdictional] decision[s] cannot ordinarily be attacked collaterally"); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983); *Durfee v. Duke*, 375 U.S. 106, 111 (1963). Of course, if ARTBA incorrectly filed its prior unreasonable-delay suit in the court of appeals rather than the district court – as EPA then argued – EPA might escape issue preclusion if the court of appeals lacked jurisdiction over ARTBA's unreasonable-delay suit. Both to save judicial and public resources from duplicative litigation and to resolve a circuit split in authority, this Court should resolve whether to file unreasonable-delay suits in the courts of appeals under the All Writs Act or in district courts under Clean Air Act §304(a)(2), 42 U.S.C. §7604(a)(2).

4. Because *Navajo Tribe* would provide the court of appeals jurisdiction for ARTBA's petition-denial claim, and *National Mining* would deny that jurisdiction, this case squarely presents the question whether an earlier three-judge panel decision in an intra-circuit split binds subsequent three-judge panels. The courts of appeal are split on this question, which is central to public confidence in *stare decisis* and judicial fairness. The importance of this question requires the Court to exercise its supervisory authority over the lower courts.

5. Finally, given the D.C. Circuit's exclusive review of nationally applicable CAA rules and its abdication of that role here, it falls to this Court to enforce §307(b)(1)'s entrusting review under this far-reaching statute to that "single court intimately familiar with administrative procedures" to "insur[e] that [CAA's] substantive provisions ... would be uniformly applied" nationwide. *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 283-84 (1978). While perhaps

not technically relevant to the legal issues presented here, these jurisdictional issue are extraordinarily important because CAA touches almost every aspect of life, including not only public health but also the economy, energy, consumer products, land use, and apparently anthropogenic global warming.[5] Only this Court can reopen the door to review arbitrary or unlawful agency action in countless contexts under CAA, SMCRA, and other similar statutes.

## I. §307(b) AND ALL WRITS ACT PROVIDE REVIEW OF PETITION-DENIAL CLAIMS

Under *Navajo Tribe* and the legislative history to CAA's 1977 amendments, the petition-reopener process plainly applies to review under §307(b)(1). *Navajo Tribe*, 515 F.2d at 666-67; H.R. REP. 94-1175, at 264; S. REP. 95-294, at 322-23. Moreover, under *Navajo Tribe* and §307(b)(2), that review is not limited here to post-1994 issues. First, *Navajo Tribe* held that §307(b)(1)'s "solely" language did not limit the scope of review, once the petitioner had met the jurisdictional criteria for being in that court. *Navajo Tribe*, 515 F.2d at 667. Second, §307(b)(2)'s plain language precludes revisiting issues previously reviewable under §307(b)(1) only in "civil or criminal proceedings for enforcement." 42 U.S.C. §7607(b)(2). Because this is no such proceeding, §307(b) does not preclude ARTBA's reliance on grounds available in

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[5] If the court of appeals is correct that it lacked jurisdiction because ARTBA failed to file a petition within 60 days of information's arising, then the court of appeals and this Court lacked jurisdiction to review EPA's denial of the petition in *Massachusetts v. EPA*, 549 U.S. 497, 510-11 (2007), which was filed October 20, 1999, on 1998 temperatures and a 1995 report.

1994. Nor should ARTBA's review be limited: neither ARTBA nor anyone else had a ripe claim in 1994 for the issues that ARTBA seeks to raise now.

### A. §307(b) Cannot Bar Previously Unripe Claims

As EPA's 1994 rulemaking explained, neither California nor anyone else contemplated nonroad retrofit controls in 1994. 59 Fed. Reg. at 36,974 ("EPA recognizes that CARB does not envision a retrofit requirement"). With no threatened or imminent retrofit rules, no constitutionally ripe claim existed over the pertinent parts of EPA's 1994 rulemaking,[6] and §307(b)(1)'s 60-day limit "can run only against challenges ripe for review." *Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996) ("*LEAN*") (*quoting BGE*, 672 F.2d at 149). Because ARTBA lacked ripe claims when EPA promulgated its §209(e) rules, ARTBA unquestionably can challenge those rules outside §307(b)(1)'s 60-day window. The parties and panel dispute only the *process and timing* for doing so.

Although neither the panel nor respondents dispute that ARTBA lacked ripe claims in 1994, the panel misreads *LEAN* to require filing a petition – whether an administrative petition with EPA or a petition for review with the court of appeals – within 60 days of the post-1994 ripening of ARTBA's claim.

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[6] Constitutional ripeness and standing overlap, *Allen v. Wright*, 468 U.S. 737, 750 (1984), and "share[] the constitutional requirement ... that an injury in fact be certainly impending." *Nat'l Treas. Employees Union v. U.S.*, 101 F.3d 1423, 1427-28 (D.C. Cir. 1996).

App. 9a. Although it would be *dicta* in any event because the *LEAN* petitioners lacked standing, *LEAN* merely summarizes §307(b)(1)'s requiring that "such petition is filed within sixty days of such new *grounds* arising." *LEAN*, 87 F.3d at 1385 (emphasis added). As the next section explains, binding precedent and legislative history require presenting issues to EPA by administrative petition, before filing a petition for review in court. In the remainder of this section, ARTBA shows that information's arising or claims' ripening does not trigger an obligation to act within 60 days.

It is black-letter law that the petition-reopener doctrine requires parties with previously unripe and presently untimely claims to cure the timeliness defect by filing an administrative petition with the agency before petitioning for review in court: if "BG&E, at some future date, should have a ripe case ..., it can file a complaint with the Commission and, if the complaint is rejected, seek our review within 60 days of that Commission order." *BGE*, 672 F.2d at 149-50; *Investment Co.*, 551 F.2d at 1281. Except for constructive denial or unreasonable delay, *Sierra Club v. Thomas*, 828 F.2d 783, 793-96 (D.C. Cir. 1987), such parties cannot sue until the agency acts on the petition. *Consolidation Coal Co. v. Donovan*, 656 F.2d 910, 915 (3d Cir. 1981). The petition-reopener doctrine allows a party to revive an otherwise time-barred claim.

The panel's suggestion – suing directly on the ripening of a claim – would eviscerate limits like §307(b). Under that view, *someone* could challenge a longstanding EPA rule at any time, which means that membership groups could do so at any time. For example, environmental groups could litigate based

on a member's either reaching an eighteenth birthday and thus having the ability to sue or moving to a threatened area and thus suffering injury from pollution in that area. Almost as easily, industry groups could find a new entrant into a regulated field who thereby has newly ripe claims against longstanding rules. Whatever the range of its plausible interpretations, §307(b) clearly did not *lower* the barrier to judicial review.

The panel's other suggestion – petitioning EPA within 60 days of ripening or new information, App. 9a-11a[7] – also contradicts settled law. *Navajo Tribe* held the Tribe could petition EPA years after its "new information" arose, with judicial review if the Tribe timely petitioned the court for review after EPA acted on the administrative petition. 515 F.2d at 66. Even *National Mining* found that the association's claim that federal over-filing conflicts with state authority in SMCRA primacy states was timely and reviewed that claim. *National Mining*, 70 F.3d at 1352. Although that association petitioned the Department of Interior *in 1986*, over-filing conflict already was factually extant *in 1984*, 52 Fed. Reg. 21,598, 21,601 (1987), well outside the 60-day

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[7] This panel resurrects a standard Congress rejected in 1970, when it amended S. 4358 in conference to require suing on after-arising *grounds* (*e.g.*, petition denials), not "whenever ... significant new information has become available." *Navajo Tribe*, 515 F.2d at 660 (*quoting* S. 4358, 91st Cong., 2d Sess., §308(a) (1970)). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

window. Of course, state-federal conflict is legally implicit in federal over-filing and was thus implicit in the 1979 rulemaking that authorized over-filing. Under the circumstances, the panel below applied *National Mining* even more strictly against petition-denial claims than *National Mining* itself.

Here, ARTBA petitioned EPA after issues arose (disparate locomotive rules, market-participant rules, Fleet Rules) or ripened (In-Use Controls), and ARTBA sued within 60 days of EPA's final action on ARTBA's petition. That is all §307(b)(1) requires.

### B. §307(b) Requires Pre-Suit Petitions

The APA and CAA both not only allow but also *require* petitioning EPA before seeking judicial review of previously unripe, presently untimely claims. *Nat'l Labor Relations Bd. Union v. FLRA*, 834 F.2d 191, 195-196 (D.C. Cir. 1987) (APA); *Her Majesty the Queen in Right v. EPA*, 912 F.2d 1525, 1530-31 (D.C. Cir. 1990) (CAA). Indeed, with regard to agency rules rendered arbitrary by inconsistent later developments, the petition-reopener process is the *only* way to challenge such after-the-fact arbitrariness. *Auer v. Robbins*, 519 U.S. 452, 459 (1997). *Navajo Tribe* further recognized that the petition-reopener process comes from a prior statute, and that "[§]307's 'solely' language will never by itself excuse [EPA] from [its] duty to respond on the merits to a request for revision." 515 F.2d at 667. Of course, "'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975); 5 U.S.C. §559 ("Subsequent statute may not be held to ... modify [APA review] except to the extent that it does so

expressly"); *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999) ("clear evidence" required). Congress did not provide clear evidence of any intent to repeal §553(e).

To the contrary, CAA's 1977 amendments expressly ratify *Navajo Tribe*. H.R. REP. 94-1175, at 264; S. REP. 95-294, at 323. Moreover, Congress expressly rejected only the *dictum* from *Investment Co.* that the petitioner-reopener doctrine allows reopening rules for "an undefined legitimate excuse," not the holding from *Investment Co.* that both allows and requires the petition-reopener process for claims that ripen or arise after the 60-day window. S. REP. 95-294, at 322; *Investment Co.*, 551 F.2d at 1280-81; Section I.C, *infra* (other circuits support *Navajo Tribe*). That selective rejection evidences knowledge and ratification of the default petitioner-reopener doctrine for non-ripe claims.

In summary without *National Mining*, EPA could not credibly deny that §307(b) allows review of ARTBA's petition-denial claim. With regard to *National Mining*, ARTBA submits that *National Mining* was wrongly decided. Accepting the *National Mining* premise that the petition-reopener doctrine was well established cannot compel the *National Mining* conclusion that "Congress appears to have devoted particular efforts" to reject that doctrine. 70 F.3d at 1351. Consistent with the canon against repeals by implication, it is more likely that Congress assumed that the petition-reopener doctrine *would continue*. It is even more likely that Congress viewed the SMCRA provisions to mirror the pre-existing CAA provision addressed in *Navajo Tribe* and the contemporaneous CAA amendments, which neither the *National Mining* panel nor parties discussed. Unlike the D.C. Circuit in this case or in

*National Mining*, courts look to contemporaneous legislation to determine legislative context and intent. *See, e.g., Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 180 (1945); *Houston Corp. v. U.S.*, 219 F.2d 841, 844 (9th Cir. 1955).[8] *National Mining* does not construe SMCRA correctly, much less the CAA.

Although the *National Mining* panel thought that the D.C. Circuit had "never held that this [§553(e)] procedural device, standing alone, was sufficient to avoid the congressional bar," *National Mining*, 70 F.3d at 1351, the panel was wrong:

> [W]e note that the public's right to petition the Administrator for revision of a [rule] and the Administrator's duty to respond substantively to such requests exist completely independently of Section 307[.]

*Navajo Tribe*, 515 F.2d at 667 (*citing* 5 U.S.C. §553(e)). Due process forbids saddling ARTBA with mistakes by the *National Mining* parties and panel. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998); *Taylor v. Sturgell*, 128 S.Ct. 2161, 2171 (2008); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). ARTBA deserves its day in court.

ARTBA respectfully submits that *National Mining* was wrongly decided to the extent that it would deny review of *ultra vires* CAA rules that a petitioner lacked ripe claims to challenge when first promulgated. Insofar as ARTBA brings CAA claims,

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[8] Congress enacted SMCRA on August 3, 1977, PUB. L. NO. 95-87, 91 Stat. 504 (1977), and CAA's 1977 amendments four days later. PUB. L. NO. 95-95, 91 Stat. at 685.

the ARTBA panel had to follow *Navajo Tribe*, the earlier (and more on point) precedent in this intra-Circuit split. *See* Section IV, *infra*. This Court, of course, can uphold either *Navajo Tribe* and its extra-circuit progeny or *National Mining*. However it rules, this Court should resolve the circuit split.

### C. Panel Deviates from Other Circuits

As *Navajo Tribe* acknowledged, the Eighth Circuit viewed §307(b)(1) to *require* the petition-reopener process, whereas *Navajo Tribe* imposed that process on litigants as an exercise of courts' equitable powers. *Navajo Tribe*, 515 F.2d at 665-66; *Union Elec. Co. v. EPA*, 515 F.2d 206, 220 (8th Cir. 1975). Whether required by CAA or imposed by the courts, most other circuits have also recognized the petition-reopener process under §307(b)(1). *Maine v. Thomas*, 874 F.2d 883, 889-90 (1st Cir. 1989); *Vermont v. Thomas*, 850 F.2d 99, 104 (2d Cir. 1988); *Consolidation Coal*, 656 F.2d at 914-15 (Third Circuit); *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 328-29 (7th Cir. 1983); *Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1357 (11th Cir. 2006); *accord NRDC v. Johnson*, 461 F.3d 164, 173-74 (2d Cir. 2006) (tolerances under the Food Quality Protection Act). Against these decisions from other circuits, the panel decision here (App. 9a-11a) is aberrational. Indeed, the SMCRA precedent on which the panel relied also is aberrational. *Compare National Mining*, 70 F.3d at 1351 *with Tug Valley Recovery Ctr. v. Watt*, 703 F.2d 796, 800 (4th Cir. 1983) (describing petition-reopener doctrine as SMCRA's "proper procedure"). This Court should grant the writ to ensure uniformity of the circuits on this important issue of judicial review.

### D. All Writs Act Allows Review, Even if §307(b) Does Not

Even without accepting ARTBA's position on *Navajo Tribe*, §307(b)(1), and §307(b)(2), the D.C. Circuit nonetheless had jurisdiction to review EPA's response to ARTBA's petition to preserve prospective jurisdiction over nationally applicable §209(e) rules. Under the All Writs Act, courts have jurisdiction to compel agency action unreasonably withheld if that action, once taken, would be reviewable in that court. *In re Bluewater Network*, 234 F.3d 1305, 1314-15 (D.C. Cir. 2000); *Sierra Club v. Thomas*, 828 F.2d at 793-94; *Pub. Utility Comm'r v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985); *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1421 (11th Cir. 1993). Without definitive answers to ARTBA's substantive questions, ARTBA will face litigation across the country against EPA and state agencies in courts that lack the D.C. Circuit's expertise and, in all likelihood, also will lack national uniformity.

The multiplicity of suits would irreparably harm ARTBA. *See, e.g.*, 11A WRIGHT AND MILLER, FED. PRAC. & PROC. Civ.2d §2944 (1995 & Supp. 2010) ("legal remedy may be deemed inadequate if [*inter alia*] effective legal relief can be secured only by a multiplicity of actions"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 273-74 (1997) ("federal court's equitable jurisdiction [can be] necessary to avoid ... [the] possibility of [a] multiplicity of suits causing irreparable damage") (interior quotations omitted, textual alterations in original, ellipsis added, citing Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 377-78 (1930)); *Reed Enterprises v. Corcoran*, 354 F.2d 519, 523 (D.C. Cir. 1965) (finding multiplicity of legal

proceedings to constitute irreparable harm). As the inevitable preemption and SIP challenges wind their way through courts in various circuits, the uncertainty over §209(e)'s scope jeopardizes sound planning under CAA's SIP process. To make matters worse for ARTBA's members, failure to meet SIP deadlines results in sanctions that withhold highway construction funding. 42 U.S.C. §7509(b). For the foregoing reasons, ARTBA's substantive issues require expeditious and uniform resolution by the D.C. Circuit, with the possibility of review here.

## II. RE-PROMULGATION REOPENS REVIEW

EPA elected to join ARTBA's petition with EPA's rulemaking under the Bond Amendment. In conjunction with that rulemaking, EPA re-proposed the entire §209(e) rule, with minor revisions, 72 Fed. Reg. at 28,391-93, and re-promulgated that entire rule, with minor revisions. 73 Fed. Reg. at 59,379-80. That reopens the entire §209(e) rule to review:

> When [EPA] reopens a proceeding for any reason and, after reconsideration, issues a new and final order setting forth the rights and obligations of the parties, that order – even if it merely reaffirms the rights and obligations set forth in the original order – is reviewable on its merits.

*BLE*, 482 U.S. at 278; *Clark*, 749 F.2d at 744 ("agency decision not to amend long-standing rules after a notice and comment period is reviewable agency action"). Under the circumstances, "the period for seeking judicial review [runs] anew" because "the agency ... by some new promulgation creates the opportunity for renewed comment and

objection." *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988). The other circuits to address this or similar issues are in agreement. *See, e.g., IIRI, Inc. v. EPA*, 198 F.3d 1224, 1237-39 (10th Cir. 2000) ("EPA's detailed examination of the issue in its ... letter and its affirmative assertion of the application of the dispute rule reflect a sufficient degree of separateness, novelty, and finality, to trigger the limitations period for judicial review"); *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 260 (3d Cir. 2001); *People of State of Cal. v. FCC*, 905 F.2d 1217, 1245 (9th Cir. 1990).

In the rulemaking context, the circuits apply narrow review only when plaintiffs seek review of regulatory text not covered by the agency rulemaking. *Compare, e.g., Kelley v. Selin*, 42 F.3d 1501, 1515 (6th Cir. 1995) *with* 58 Fed. Reg. 17,948, 17,967 (1993); *compare also Public Citizen Inc. v. Mineta*, 343 F.3d 1159, 1170 (9th Cir. 2003) *with* 66 Fed. Reg. 65,376, 65,403 (2001); *compare also Pan American Grain Mfg. Co., Inc. v. EPA*, 95 F.3d 101, 104 n.1 (1st Cir. 1996) *with* 60 Fed. Reg. 28,333, 28,336 (1995). In all of these cases, the plaintiff wanted to address issues and portions of regulations outside the issues and regulatory text in the NPRM.

By contrast, EPA re-promulgated its §209(e) rule in its entirety, with general revisions and those implementing the Bond Amendment. In doing so, EPA heightened its disparate rules on non-locomotives and locomotives, which at least before 2008 had resulted from two separate rulemakings. By proposing the disparate treatment in the *re promulgated* rules, EPA removed the aura of historical accident and heightened the implication that §209(e) protects only in-use locomotives from

Fleet Rules. In addition, contrary to EPA's arguments in *EMA v. EPA*, 88 F.3d at 1093, the Bond Amendment's using "standards or other requirements" to describe §209(e)(2)(B)'s preemption, PUB. L. NO. 108-199, §428(e), 118 Stat. at 418-19, shows that §209(e)(2)(B) mirrors §209(e)(2)(A), which bolsters the breadth of "other requirements." This new statute is "entitled to great weight in [the] statutory construction" of §209(e). *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969). Accordingly, ARTBA had every right to comment on preemption issues, even without a prior petition under §553(e). Moreover, ARTBA has every right both to an answer from EPA and to judicial review of that answer.

Even as to issues such as the market-participant exception (*i.e.*, ARTBA's issue #4) that fall outside both ARTBA's administrative petition and the comments specifically requested by EPA's NPRM, ARTBA had every right to comment because the issue was relevant to the regulatory text that EPA proposed. As the panel notes, a strand of D.C. Circuit authority describes such comments as "goad[ing] an agency into a reply," for which the D.C. Circuit denies judicial review. App. 11a. Fortunately, no other circuit has followed the D.C. Circuit in so limiting the comment process on issues that fall within the proposed regulatory text. A comment that relates to the proposed regulatory text is essentially a petition to change that text in the final rule, and "[553(e)] applies not merely to effective rules... *but to proposed or tentative rules*." APA Leg. Hist. at 260 (emphasis added); *accord id.* at 201 ("this subsection [*i.e.*, 553(e)] applies to... proposed or tentative rules"). This case presents an opportunity to

invalidate this over-narrow review before it spreads outward from the D.C. Circuit.

## III. ISSUE PRECLUSION REQUIRES REOPENER

Five years after ARTBA petitioned EPA and fourteen months after ARTBA sued for unreasonable delay and constructive denial, EPA issued its §209(e) NPRM. 72 Fed. Reg. 28,098 (2007). EPA then moved to dismiss ARTBA's prior suit for mootness, quoting from *In re Int'l Union*, 231 F.3d 51, 54 (D.C. Cir. 2000), that NPRMs moot unreasonable-delay claims based on "a matter that the agency proposes to regulate in that rulemaking," App. 111a, and arguing that "EPA has now commenced a rulemaking on the issues ARTBA raised." App. 109a.

Although the panel suggests that this provides mere "evidence" of what EPA's rulemaking meant, App. 13a, EPA is *collaterally estopped* from denying now that the NPRM crossed the reopener threshold then. Indeed, ARTBA argued in 2007 precisely what the panel argues now: that EPA proposed nothing. *Compare* App. 113a ("EPA's NPRM does not propose any action on ARTBA's petition") (*citing* 72 Fed. Reg. at 28,209-10) (ARTBA) *with* App. at 13a ("EPA went further [than ["indicat[ing] that [it] had undertaken [no] serious, substantive reconsideration"], saying explicitly in its [NPRM] that it was not proposing to adopt the [] changes requested by ARTBA in its petition") (*citing* 72 Fed. Reg. at 28,209) (interior quotations and citations omitted) (panel). ARTBA lost that argument. *ARTBA v. EPA*, No. 06-1112 (D.C. Cir. Oct. 5, 2007) (App 115a). Issue preclusion prevents ARTBA's losing the opposite argument now.

By holding that EPA's NPRM mooted ARTBA's unreasonable-delay claim, the prior adjudication necessarily held that EPA's NPRM *did something*. Certainly mere publication of notice of a petition cannot moot an unreasonable-delay claim. *Pub. Citizen Health Research Group v. Comm'r*, 740 F.2d 21, 34 (D.C. Cir. 1984). The only thing that could moot ARTBA's prior unreasonable-delay claim is EPA's having done in 2007 what EPA argued in 2007 that EPA did: "commence[] a rulemaking on the issues ARTBA raised." App. 109a. The prior ruling necessarily held that EPA reopened its §209(e) rule. Even if that was wrong then, it binds EPA now. *Durfee*, 375 U.S. at 111; *Mike Hooks*, 313 F.2d at 699; *Dozier*, 702 F.2d at 1191; *Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 706-07 (1982).

In *ARTBA's* view, the panel here had no authority to reject the conclusive determination that EPA's rulemaking addressed the issues that ARTBA raised. Under the circumstances, the court of appeals had jurisdiction, either under §307(b)(1) over the final rule itself or under the All Writs Act over EPA's dodging the issues that ARTBA raised.

In EPA's view, however, an unreasonable-delay claim like ARTBA's prior suit belonged in the district court under CAA §304(a)(2), not in the court of appeals under §307(b)(1) or the All Writs Act. 42 U.S.C. §7604(a). Before CAA's 1990 amendments, such claims plainly belonged in the courts of appeals, *Sierra Club v. Thomas*, 828 F.2d at 790-91, but EPA claimed that the 1990 amendments changed that. *See, e.g., Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 262-63 (2d Cir. 1992) ("[t]he utilities' syllogism is bottomed on a fallacy, namely their theory that

'Clean Air Act nondiscretionary-duty cases are a subset of unreasonable delay cases' [but t]he two categories, however, are distinct"). The resolution of this issue in EPA's favor could defeat issue preclusion. *But see Newdow v. Lefevre*, 598 F.3d 638, 645 (9th Cir. 2010) ("*Steel Co.* [*v. Citizens for a Better Environment*, 523 U.S. 83 (1998)] did not overturn the holdings of every case that had been decided using the 'hypothetical jurisdiction' approach"). Even if it defeats ARTBA's issue-preclusion claim, this Court should resolve the splits in authority.

## IV. EARLIER DECISIONS CONTROL INTRA-CIRCUIT SPLITS

Under *Navajo Tribe*, anyone seeking judicial review outside §307(b)(1)'s 60-day window must present their information or claims to EPA by administrative petition, seeking judicial review only after EPA denies the petition. *Navajo Tribe*, 515 F.2d at 666. Even if other circuits and Congress had not embraced this sensible approach, *see* Sections I.B-I.C, *supra*, the D.C. Circuit settled the issue in 1975. As a subsequent three-judge decision, nothing in *National Mining* can unsettle that settled question.

Without any party or the *National Mining* panel's even considering *Navajo Tribe*, *see* note 4, *supra*, the *National Mining* panel ruled the opposite way. In its briefing and its petition for rehearing, ARTBA argued that prior circuit precedent bound three-judge panels in the D.C. Circuit to ignore *National Mining* as the later-decided case in an intra-circuit split. The panel ignored that obligation.

The circuits are split on how to address intra-circuit splits, an issue that was decisive in this litigation. The Ninth Circuit elevates intra-circuit

splits to the *en banc* court. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (*en banc*). By contrast, the weight of circuit authority (including the D.C. Circuit) calls for disregarding the second decision in the intra-circuit split, reasoning that the second three-judge panel lacked authority to overrule the decision of the first three-judge panel. *See, e.g., Ryan v. Johnson,* 115 F.3d 193, 198 (3rd Cir. 1997); *McMellon v. United States,* 387 F.3d 329, 333 (4th Cir. 2004) (*en banc*); *Southwestern Bell Tel. Co. v. City of El Paso,* 243 F.3d 936, 940 (5th Cir. 2001); *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985); *Hiller v. Oklahoma ex rel. Used Motor Vehicle & Parts Comm'n,* 327 F.3d 1247, 1251 (10th Cir. 2003); *Morrison v. Amway Corp.*, 323 F.3d 920, 929 (11th Cir. 2003); *Indep. Cmty. Bankers of Am. v. Bd. of Govs., Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999). Finally, the Eighth Circuit takes the least disciplined approach to *stare decisis* and the authority of three-judge panels: "[w]hen there is an intra-circuit split, we are free to choose which line of cases to follow." *Toua Hong Chang v. Minnesota,* 521 F.3d 828, 832 n.3 (8th Cir. 2008). Here, the panel followed the Eighth Circuit in choosing to ignore the earlier precedent and to accept the later one.

In the criminal-justice context, this Court has recognized the "raw power of [jury] nullification." *Graham v. Collins,* 506 U.S. 461, 487 (1993) (alteration in original, interior quotation omitted) (Thomas, J., concurring). This Court's supervisory authority over the lower courts requires the Court to address the judicial variety: nullification by selective application of otherwise-binding precedent. Given the importance of *stare decisis* and judicial authority

to litigants and the public generally and to this litigation specifically, the Court should recognize and hold that three-judge panels are not free to reject binding circuit precedent. Litigants and the public place great faith in *stare decisis*, both in ordering their behavior and in deciding when to devote the considerable resources that litigation requires. For courts to command public trust as fair and impartial arbiters, litigation cannot be a lottery or coin toss.

## V. CAA REVIEW RAISES IMPORTANT ISSUES

CAA §209 affects all citizens directly through vehicles and even garden equipment, as well as indirectly through costs imposed on construction and transportation. The larger CAA affects citizens through public health, industry and the economy, consumer products, and even fireplaces and backyard barbecues. The panel would freeze CAA rulemaking on all these fronts and more.

By contrast, Congress recognized that it is "not be in the public interest to measure for all time the adequacy of a promulgation ... by the information available at the time of such promulgation," and so allowed "challenge [to] any promulgat[ion] whenever it is alleged that significant new information has become available." S. REP. 91-1196, 41-42 (1970). As explained in note 7, *supra*, Congress wisely revised the Senate's trigger from after-arising *information* to after-arising *grounds*, but the larger policy issue remains intact: neither courts nor EPA should freeze rules in place merely because those rules once seemed correct. "[A]gency interpretation is not instantly carved in stone [and] to engage in informed rulemaking, [agencies] must consider varying interpretations ... on a continuing

basis." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984). Under the circumstances here, new information compels new rules.

For example, EPA's disparate treatment of locomotives versus non-locomotive nonroad vehicles suggests, explicitly and implicitly, that §209(e) protects in-use locomotives – but not in-use construction equipment – from Fleet Rules. Indeed, EPA previously called ARTBA's litigation against In-Use Controls and Fleet Rules in Texas an "inappropriate collateral attack on [EPA's] regulations." 66 Fed. Reg. 57,223, 57,224-25 (2001). Although EPA's response to ARTBA's petition professed some agreement with ARTBA on key points, App. 28a, the procedural stature of EPA's response led the Ninth Circuit to grant a motion to strike EPA's response, thereby forbidding a litigant even to cite EPA's action as an authority. *Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.*, 08-17309 (9th Cir. May 14, 2009) (App. 116a); *cf.* 75 Fed. Reg. 28,509, 28,510 (2010) (proposing approval of SIP rule under EPA's challenged views of §209(e)'s preemption).

Intentionally or not, EPA has punted to the various circuits issues that Congress wanted the D.C. Circuit to decide uniformly. *Adamo Wrecking*, 434 U.S. at 283-84; 42 U.S.C. §§7601(a)(2)(A), 7607(b)(1). EPA's preemption rules and its response to ARTBA's petition are inadequate for nationwide uniformity, thereby triggering jurisdiction under both §307(b)(1) and the All Writs Act.

Finally, the fact that §307(b)(1) and other similar statutes provide the D.C. Circuit *exclusive* jurisdiction magnifies this Court's reviewing role. Although it always is the last backstop against

errors in the lower courts, this Court usually can rely on the federal circuits to resolve difficult issues, with this Court's resolving circuit splits that materialize. Exclusive jurisdiction in the D.C. Circuit greatly reduces the room for circuit splits to develop. Here, this Court is not merely the *last* backstop; it is the *only* backstop to enforce the congressional scheme.

## CONCLUSION

The petition for a writ of *certiorari* should be granted.

June 3, 2010

Respectfully submitted,

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**United States Court of Appeals for the District of Columbia Circuit**

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION,

PETTTIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY AND LISA PEREZ JACKSON, IN HER OFFICIAL CAPACITY,

RESPONDENTS.

and.

ASSOCIATION OF AMERICAN RAILROADS, *ET AL.*,

INTERVENORS.

No. 08-1381
Argued Nov. 9, 2009
Decided Dec. 11, 2009

**Before:** GARLAND and KAVANAUGH, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

On Petition for Review of an Order of the Environmental Protection Agency

Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

WILLIAMS, Senior Circuit Judge: The American Road and Transportation Builders Association is a trade organization representing the "transportation construction industry"—companies that build roads, public transit systems, airports and the like. In 2002 ARTBA, as the group calls itself, petitioned the U.S.

Environmental Protection Agency to amend two regulations implementing § 209(e) of the Clean Air Act (codified at 42 U.S.C. § 7543(e)). EPA had originally promulgated the provisions at issue—40 C.F.R. § 85.1603 and 40 C.F.R. pt. 89, subpt. A, App. A—in 1994, 59 Fed. Reg. 36,969, 36,986 (July 20, 1994); 59 Fed. Reg. 31,306, 31,339 (June 17, 1994), and then readopted them in 1997, 62 Fed. Reg. 67,733, 67,736 (December 30, 1997). After a bit of litigation over the agency's failure to act on ARTBA's petition, EPA formally opened it to public comment in 2007, 72 Fed. Reg. 28,098, 28,209-10 (May 18, 2007), then rejected it in 2008, 73 Fed. Reg. 59,034, 59,130 (October 8, 2008). Shortly thereafter, ARTBA sought review in this court. We now dismiss that suit for lack of jurisdiction, on the grounds that *National Mining Association v. U.S. Department of the Interior*, 70 F.3d 1345 (D.C. Cir. 1995), requires us to treat ARTBA's petition to EPA as a challenge to the regulations it sought revised, and that judicial review of such a challenge is time-barred under Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1).

* * *

Clean Air Act § 209(e) prohibits states from imposing certain emissions-related regulations on various categories of engines and vehicles. ARTBA takes the position that EPA's rules interpreting § 209(e) have the effect of allowing states to adopt precisely the kinds of regulations that the statute forbids—partly because the rules are insufficiently comprehensive, and partly because some of their content is inconsistent with the statutory language. So, for example, ARTBA asked EPA to amend one of its regulations, 40 C.F.R. § 85.1603, to make clear that among the laws preempted are "fleet average

standards," which prescribe emissions limits for an operator's suite of vehicles in the aggregate. See *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 249-50 (2004). The request that EPA revise 40 C.F.R. pt. 89, subpt. A, App. A, by contrast, reflected ARTBA's view that that provision affirmatively deems permissible state regulations that the statute, properly construed, prohibits. In response to ARTBA's petition, EPA offered a lengthy analysis disputing that further specificity was warranted where ARTBA sought it, and defending the interpretations that ARTBA argued were wrong.

In opposition to the present action, the agency suggests two reasons why our jurisdiction does not extend to ARTBA's suit. One is the time-bar issue mentioned above; the other is a contention that ARTBA cannot establish constitutional standing.

Article III of the Constitution requires ARTBA, of course, to allege an injury that is fairly traceable to the agency's conduct and redressable by this court. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In EPA's view, ARTBA has failed to do so with respect to each of the numerous putative harms it identifies, including among others injuries arising from state air quality remediation plans requiring EPA's approval. See Clean Air Act § 110(a)(2)(E)(i), 42 U.S.C. § 7410(a)(2)(E)(i). This court's decision in *Louisiana Environmental Action Network v. Browner*, 87 F.3d 1379 (D.C. Cir. 1996) ("LEAN"), the government claims, "squarely defeats ARTBA's standing argument" to the extent it hinges on injury attributable to "any state regulation that EPA must approve." Respondent's Br. at 29.

The government drastically overreads *LEAN*. There several petitioners challenged an EPA rule establishing procedures for deciding whether to approve state implementation plans under the Clean Air Act. 87 F.3d at 1381. One complaint was that the rules might allow EPA to approve a state regulation, and enforce it as a federal one, even though it was more stringent than any regulation the EPA could have implemented on its own. Id. at 1383-84. The party seeking relief, however, "identified no state—never mind a state in which one of the [relevant] petitioners operates—that has adopted any more stringent rule which is or is about to be federalized by the EPA." *Id.* at 1384. Regarding the harms alleged as "hypothetical," we found a want of standing. *Id.*

Thus *LEAN* is simply an application of the conventional understanding that highly speculative concerns do not satisfy Article III's injury-in-fact requirement; it is *not* a holding that the injuries threatened by EPA rules governing future assessment of proposed state implementation plans are per se unduly remote. The canonical "actual or imminent" threat of injury remains, of course, perfectly sufficient for standing purposes. See *Lujan*, 504 U.S. at 560; *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1149 (2009).

ARTBA, for its part, has pointed to no fewer than four state regulatory regimes that, it alleges, *currently* subject its members to burdensome laws that are not permitted under the Clean Air Act, and that either have been approved by EPA or are to be submitted for its approval. Petitioner's Br. at 26-27. If the federal rules ARTBA sought to have revised really do allow such state regulations, then the

harms ARTBA members are currently suffering as a result of already-approved state plans—and would plausibly suffer as a result of future EPA approvals—are sufficiently attributable to those federal rules to satisfy the "fairly traceable" prong of the standing inquiry. See *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 438-43 (D.C. Cir. 1998) (en banc). And in the event that we agreed with ARTBA's substantive views, we could order EPA to reconsider its decision to stand pat on its existing rules. This is the remedy we typically afford meritorious petitions seeking review of agency decisions not to initiate rulemakings, and we have obviously never regarded such relief too speculative to satisfy constitutional standing requirements. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 534-35 (2007); *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 7 (D.C. Cir. 1987). Standing, in short, is not ARTBA's problem.

* * *

What dooms the organization's petition in this forum instead is subject matter jurisdiction. The section of the Clean Air Act that simultaneously authorizes and limits judicial review of EPA activity provides in relevant part:

> A petition for review of . . . any . . . nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation . . . or action appears in the

> Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1). ARTBA filed suit in this court within 60 days of EPA's decision rejecting the organization's petition for rules amendments. The question is whether that agency action opened a new filing window—or if instead we are obliged to treat a petition to revise regulations as a challenge to their *promulgation*, with the result that the relevant chronological analysis runs from that earlier date.

The general rule is that it is a perfectly valid "method of obtaining judicial review of agency regulations once the limitations period has run . . . to petition the agency for amendment or rescission of the regulations and then to appeal the agency's decision." *NLRB Union v. FLRA*, 834 F.2d 191, 196 (D.C. Cir. 1987). One twist is that not all types of petitions for rulemakings are treated equally. If the request for new rules is predicated on an alleged *procedural* defect in the promulgation of the existing rules, then we view the petition as a direct challenge to the original enactment—which will be time-barred if it falls outside the period in which judicial review of the promulgation is permitted. *Id.*; *Natural Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981). On the other hand, agency denial of a petition for a new rulemaking which complains of *substantive* infirmities in existing rules is, for the most part, judicially reviewable irrespective of time limits dating from the rules' enactment. *Professional*

*Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1217-18, n.2 (D.C. Cir. 1983) ("This court has scrutinized regulations immune from direct review by reviewing the denial of a subsequent rulemaking petition which challenged the regulation on demonstrable grounds of *substantive* invalidity.") (emphasis in original, internal quotation marks omitted); *NLRB Union*, 834 F.2d at 196 ("[A] petitioner's contention that a regulation should be amended or rescinded because it *conflicts with the statute* from which its authority derives is reviewable outside of a statutory limitations period.") (emphasis in original); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958).

We have subjected that general rule, however, to an exception. *National Mining Association* identified a circumstance in which an agency's denial of a revision-seeking petition does not allow review of alleged substantive defects in the original rule, even under the deferential standards applicable to review of such denials, outside the statutory limitations period running from the rules' original promulgation: the case in which Congress has "specifically address[ed] the consequences of failure to bring a challenge within the statutory period." 70 F.3d at 1350. We characterized the statutes at issue in *NLRB Union*, *Functional Music*, and similar cases as "not explicitly say[ing]" that "Congress meant totally to foreclose review after the statutory period." *Id.* If Congress "directly focused on the issue," however, a different outcome results: judicial review of a petition to repeal or revise rules is time-barred, except to the extent that the statute allows review based on later-arising grounds. *Id.*

Specifically, *National Mining Association* held that the following language—in that case from the Surface Mining Control and Reclamation Act—amounted to an explicit decision to preclude review of repeal- or revision-seeking petitions filed outside the statutory deadlines:

> A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day.

*Id.* (emphasis omitted). We noted, moreover, that "Congress has adopted similar limitations on judicial review in other environmental statutes," citing among others our own limitation here, Clean Air Act § 307(b)(1). *Id.* at n.2. *National Mining* did not, so far as we can discern, suggest that such language implied any sort of limitation on the recognized ability of a party against whom a regulation is enforced to contest its validity in the enforcement context. See, e.g., *NLRB Union*, 834 F.2d at 195-96.

We cannot make out any material distinction—at any rate any distinction helpful to petitioner—between the statutory language at issue in *National Mining Association* and the statutory language at issue here. Section § 307(b)(1) in fact imposes one additional constraint on petitions brought outside the original 60-day window based on after-arising grounds: they must be filed within 60 days of the new event, rather than any time after it. *National Mining Association* therefore compels the conclusion that ARTBA's 2008 petition for judicial review is time-barred for falling outside the 60-day period that

§ 307(b)(1) provided for court challenges to the 1997 re-promulgation of 40 C.F.R. § 85.1603 and 40 C.F.R. pt. 89, subpt. A, App. A—at least insofar as the petition raises points that could have been brought to our attention in 1997. See 70 F.3d at 1350, 1352.

ARTBA offers two reasons why, in its view, we have jurisdiction in any event. First is the argument that the limitations period in § 307(b)(1) can run only against ripe challenges. Since ARTBA had no ripe claim when EPA repromulgated the rules, the suggestion goes, the organization is permitted to attack them now. This line of reasoning implicates two procedural questions: *when* freshly ripened claims may be raised under § 307(b)(1); and *where* they should be filed.

We answered the first of these in *LEAN*. While we agreed with petitioner that § 307(b)(1)'s provision for judicial review after the initial filing period for suits based on newly arising grounds encompassed the occurrence of an event that ripens a claim, 87 F.3d at 1385, we noted the section's explicit requirement that a petition predicated on any such new event be filed within 60 days of the event. *Id.*

The question where, precisely, a party is supposed to file such a claim matters, among other reasons, because it determines which filing of ARTBA's is the one that must have come within 60 days of some after-arising ground—the 2002 petition to EPA, or the 2008 petition to this court. The answer is less straightforward than it may appear. Our cases on the matter start with *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975), where we said that it was "within our inherent powers to enforce our interest in informed

decision-making by requiring presentation to the Administrator of any new information thought to justify revision of a standard . . . reviewable under Section 307." Of course the *ripening* of a petitioner's claim is hardly the sort of novelty that seems to require special agency reaction. Later we raised the ante by characterizing this rule as jurisdictional, *The Group Against Smog and Pollution, Inc. v. EPA*, 665 F.2d 1284, 1290 n.45 (D.C. Cir. 1981), see also *Natural Resources Defense Council, Inc. v. Thomas*, 845 F.2d 1088, 1091-92 (D.C. Cir. 1988), but those cases, like *Oljato*, involved claims that new information called for a rule change—not that a potential claim had become newly justiciable.

As it happens, ARTBA cites no event (other than EPA's decision rejecting its petition, which *National Mining Association* says doesn't count) that would bring either filing within any newly opened 60-day window. ARTBA makes some reference, albeit in the context of discussing a different matter, to a 2001 Texas law imposing diesel emission limits that ARTBA says is in fact preempted by § 209(e) and that "imposes additional costs and regulatory burdens on ARTBA's members," Petitioner's Br. at 26—but that law took effect well over 60 days before the organization's July 12, 2002 petition to EPA. Another event that ARTBA sees as significant is EPA's 1998 rulemaking concerning the scope of federal preemption of state regulations of new locomotive engines, which was also obviously too remote in time. Finally, ARTBA now seeks to make hay of a 2004 Supreme Court decision and a 2004 statutory amendment—neither of which can render its 2002 petition or its 2008 appeal "filed within sixty days after such grounds arise." See § 307(b)(1).

Because we find that none of these events satisfies the 60-day criterion in § 307(b)(1) for challenges based on after-arising grounds, we need not determine where ARTBA should have filed in order to invoke § 307(b)(1)'s provision for after-arising grounds, nor whether ARTBA's petition met the additional requirement that it be "based solely" on those grounds.

ARTBA next argues that an EPA rulemaking in 2007-08 effectively reopened the regulations now at issue to judicial review. See *National Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998) ("*NARPO*") (describing the "reopening doctrine"). It does not rest on the fact that EPA responded to its arguments. We rarely if ever find such a response sufficient; if a party were allowed to "goad an agency into a reply, and then sue on the grounds that the agency . . . reopened the issue," *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989), the agency's thorough answer would put it at risk of "reopening," while a taciturn response would put it at risk of being faulted for acting without reasoned decisionmaking. See *National Min. Ass'n*, 70 F.3d at 1351. Rather, ARTBA contends that in the course of the separate rulemaking the agency conducted simultaneously with the publication and rejection of ARTBA's petition, EPA effectively reconsidered the totality of its § 209(e) regulatory framework.

What EPA in fact did in its rulemaking notice was to describe the existing statutory regime, identify the regulations that implement it, and lay out several discrete potential amendments, abjuring any intent to introduce substantive changes except in two designated realms:

> We are proposing to create a new part 1074 that would describe the federal preemption of state and local emission requirements. This is being done as part of EPA's ongoing effort to write its regulations in plain language format in subchapter U of title 40 of the CFR. The proposed regulations are based directly on the existing regulations in 40 CFR part 85, subpart Q. *With the exception of the simplification of the language and specific changes described in this section, we are not changing the meaning of these regulations.*

72 Fed. Reg. at 28,209/2-3 (emphasis added). The "specific changes" the agency referenced consisted of two new regulations, both implementing recent legislation preempting states other than California from imposing certain emissions-related rules on a new class of small engines. *Id.* In the final rule announcement, EPA carried out its proposal, repeating the language quoted above more or less verbatim. 73 Fed. Reg. at 59,130/1. Consistent with its asserted intention to rewrite the relevant regulations in plain language without changing their meaning, EPA also republished its § 209(e) rules in full. *Id.* at 59,380.

Considering "the entire context of the rulemaking," *NARPO*, 158 F.3d at 141, we conclude that EPA did not reopen consideration of the regulations ARTBA asked it to revise. Seemingly on ARTBA's side are *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988), and *Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984), cases in which the agency included the pre-existing regulation in a Notice of Proposed Rulemaking and responded to comments on

provisions later alleged to have been reopened; in both cases we found a reopening. But here, as in *National Mining Association*, any such responses were in answer to comments received pursuant to the publication of *petitioner's* own call for revisions, which, as we said in *National Mining*, "is not, without much more, sufficient to trigger the reopener doctrine." 70 F.3d at 1352. Though addressing feedback from ARTBA and others, the agency gave no "indication that [it] had undertaken a serious, substantive reconsideration" of the rules in question. See *id.* In fact, EPA went further, saying explicitly in its Notice of Proposed Rulemaking that it was "not proposing to adopt the . . . changes requested by ARTBA in its petition." 72 Fed. Reg. at 28,209/3. As had the agency in *National Mining*, EPA appears merely to have sought comments on the premise that they might have persuaded it to actually reopen the matter. See 70 F.3d at 1351.

Finally, ARTBA identifies one further piece of evidence indicating that EPA reconsidered the relevant regulations. In 2006, the organization filed suit alleging that EPA was unreasonably delaying action on ARTBA's 2002 petition. See *Am. Rd. & Transp. Builders Ass'n v. EPA*, No. 06-1112 (D.C. Cir., Oct. 5, 2007). In the course of that litigation, EPA argued that the case was moot since the agency had "'commenced a rulemaking on the issues ARTBA raised.'" See Reply Br. at 7 (quoting No. 06-1112, Resp. Mot. to Dismiss at 3). In ARTBA's view, this language amounts to a concession by EPA that it was reopening the rules ARTBA challenged. But even a cursory glance at the phrase, in its original context, reveals that EPA was simply referring to its publication of ARTBA's petition, rather than

stipulating for the purpose of that case and this one that the agency was revisiting the rules to the extent necessary to reopen them to judicial review. See *National Min. Ass'n*, 70 F.3d at 1351 ("The decision to publish a petition for rule-making . . . is not evidence of a reexamination of the policy at issue in the petition.").

We conclude that we are without jurisdiction to hear this petition. Accordingly, the case is

*Dismissed.*

**United States Court of Appeals for the District of Columbia Circuit**

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION,

PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY AND LISA PEREZ JACKSON, IN HER OFFICIAL CAPACITY,

RESPONDENTS.

ASSOCIATION OF AMERICAN RAILROADS, *ET AL.*,

INTERVENORS.

No. 08-1381
Filed On: Dec. 11, 2009

On Petition for Review of an Order of the Environmental Protection Agency

**Before:** GARLAND and KAVANAUGH, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

**JUDGMENT**

This cause came on to be heard on the petition for review of an order of the Environmental Protection Agency and was argued by counsel. On consideration thereof, it is

**ORDERED** and **ADJUDGED** that the petition for review is dismissed for lack of jurisdiction, in accordance with the opinion of the court filed herein this date.

*Per Curiam*

**FOR THE COURT:**
Mark J. Langer, Clerk

**United States Court of Appeals for the District of Columbia Circuit**

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION,

PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY AND LISA PEREZ JACKSON, IN HER OFFICIAL CAPACITY,

RESPONDENTS.

ASSOCIATION OF AMERICAN RAILROADS, *ET AL.*,

INTERVENORS.

No. 08-1381
Filed On: Mar. 5 2010

On Petition for Review of an Order of the Environmental Protection Agency

**BEFORE:** Garland and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

**ORDER**

Upon consideration of petitioner's petition for panel rehearing filed on January 25, 2010, it is

**ORDERED** that the petition be denied.

*Per Curiam*

**FOR THE COURT:**
Mark J. Langer, Clerk

**United States Court of Appeals for the District of Columbia Circuit**

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION,

PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY AND LISA PEREZ JACKSON, IN HER OFFICIAL CAPACITY,

RESPONDENTS.

ASSOCIATION OF AMERICAN RAILROADS, *ET AL.*,

INTERVENORS.

No. 08-1381
Filed On: Mar. 5, 2010

On Petition for Review of an Order of the Environmental Protection Agency

**BEFORE:** Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

**ORDER**

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

*Per Curiam*

**FOR THE COURT:**
Mark J. Langer, Clerk

**72 Fed. Reg. 28,098 (May 18, 2007)**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 60, 63, 85, 89, 90, 91, 1027, 1045, 1048, 1051, 1054, 1060, 1065, 1068, and 1074**

**[EPA-HQ-OAR-2004-0008; FRL-8303-7]**

**RIN 2060-AM34**

**Control of Emissions from Nonroad Spark-Ignition Engines and Equipment**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

* * *

Section XI describes a variety of proposed provisions that affect other categories of engines besides those that are the primary subject of this proposal. This includes the following changes:

• We are proposing to reorganize the regulatory language related to preemption of state standards and to clarify certain provisions. We are also requesting comment regarding a petition to reconsider some of the provisions including the extent to which states may regulate the use and operation of nonroad engines and vehicles.

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## XI. Proposals Affecting Other Engine and Vehicle Categories

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*A. State Preemption*

Section 209(e) of the Clean Air Act prohibits states and their political subdivisions from adopting or enforcing standards and other requirements relating to the control of emissions from nonroad engines or vehicles. Section 209(e) authorizes EPA to

waive this preemption for California for standards and other requirements for nonroad engines and vehicles, excluding new engines that are smaller than 175 horsepower used in farm or construction equipment or vehicles and new locomotives or new engines used in locomotives. States other than California may adopt and enforce standards identical to California standards authorized by EPA.

EPA promulgated regulations implementing section 209(e) on July 20, 1994 (59 FR 36987). EPA subsequently promulgated revised regulations implementing section 209(e) on December 30, 1997 (62 FR 67733). See 40 CFR part 85, subpart Q. We are proposing to create a new part 1074 that would describe the federal preemption of state and local emission requirements. This is being done as part of EPA's ongoing effort to write its regulations in plain language format in subchapter U of title 40 of the CFR. The proposed regulations are based directly on the existing regulations in 40 CFR part 85, subpart Q. With the exception of the simplification of the language and specific changes described in this section, we are not changing the meaning of these regulations.

Pursuant to section 428 of the 2004 Consolidated Appropriations Act, we are proposing to add regulatory language to implement the legislative restriction on states other than California adopting, after September 1, 2003, standards or other requirements applicable to spark-ignition engines smaller than 50 horsepower. We are also proposing to add, pursuant to that legislation, criteria for EPA's consideration in authorizing California to

adopt and enforce standards applicable to such engines.[103]

On July 12, 2002, the American Road and Transportation Builders Association (ARTBA) petitioned EPA to amend EPA's rules implementing section 209(e) of the Act.[104] In particular, ARTBA petitioned EPA to amend its regulations and interpretive rule regarding preemption of state and local requirements "that impose in-use and operational controls or fleet-wide purchase, sale or use standards on nonroad engines."[105]

ARTBA believes such controls should be preempted. As we are already revising the preemption provisions to a certain extent in this rule, we believe it is appropriate to respond to ARTBA's petition in the context of this rule, while giving the public the ability to respond to provide comments regarding ARTBA's petition. EPA is not proposing to adopt the explicit changes requested by ARTBA in its petition; however, EPA will continue to review the arguments raised by ARTBA's petition, as well as all further arguments provided by ARTBA

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[103] See section 428 of the Appropriations Act for 2004.

[104] "Petition to Amend Rules Implementing Clean Air Act section 209(e)," American Road and Transportation Builders Association (ARTBA), July 12, 2002. Also, EPA received an additional communication from ARTBA urging EPA to grant the petition after the decision of the U.S. Supreme Court in EMA v. SCAQMD, 541 U.S. 246 (2004). See "ARTBA Petition," L. Joseph, ARTBA, to D. Dickinson & R. Doyle, EPA, April 30, 2004. These documents are available in Docket EPA-HQ-OAR-2004-0008.

[105] In 1994, EPA promulgated an interpretive rule at Appendix A to subpart A of 40 CFR part 89. The appendix provides that state restrictions on the use and operation of nonroad engines are not preempted under section 209.

and other commenters during the period for notice and comment on *28210 this issue. We will respond to the petition, and if appropriate, make any changes to the regulations to conform our response to ARTBA and other commenters in the final rule. We request comment from the public regarding issues related to ARTBA's petition and how we should respond.

August 21, 2008

# RESPONSE TO THE PETITION OF AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION TO AMEND REGULATIONS REGARDING THE PREEMPTION OF STATE STANDARDS REGULATING EMISSIONS FROM NONROAD ENGINES

## I. Introduction

On July 12, 2002, the American Road and Transportation Builders Association (ARTBA) petitioned the Environmental Protection Agency (EPA) to amend its rules implementing section 209(e) of the Clean Air Act (Act).[1] In particular, ARTBA petitioned EPA to amend its regulations and interpretive rule regarding preemption of state and local requirements "that impose in-use and operational controls or fleet-wide purchase, sale or use standards on nonroad engines."[2] ARTBA believes such controls should be preempted.

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[1] "Petition to Amend Rules Implementing Clean Air Act section 209(e)," American Road and Transportation Builders Association (AICTBA), July 12, 2002. EPA also received an additional communication from ARTBA urging EPA to grant the petition after the decision of the U. S. Supreme Court in EMA v. SCAQMD, 541 U.S. 246 (2004). See "ARTBA Petition," L. Joseph, ARTBA, to D. Dickinson & R. Doyle, EPA, April 30, 2004. These documents are available in Docket EPA-HQ-OAR-2004-0008.

[2] In 1994, EPA promulgated an interpretive rule at Appendix A to subpart A of 40 CFR part 89. 59 Fed. Reg. 31305, 31339-40 (June 17, 1994). This interpretive rule was amended as part of the rule promulgated on December 30, 1997 (62 FR 67733). The appendix provides, among other things, that state restrictions on the use and operation of nonroad engines are not preempted under section 209.

On May 18, 2007, EPA requested comment on ARTBA's petition as a part of a proposed rule related to control of emissions from spark-ignition nonroad engines, which also contained certain proposed changes in the regulations related to preemption of state and local standards and other requirements related to the control of emissions from nonroad vehicles and engines. EPA received several comments related to ARTBA's petition, both supporting and opposing the petition.

For reasons discussed in detail below, EPA is not revising its regulations as requested by ARTBA. Regarding fleetwide averaging standards, we believe the regulations as written are sufficient and need not be revised. Regarding early retirement provisions, we believe they are more appropriately addressed on a case-by case basis and not a regulation, and regarding fleet purchase-sale restrictions, we believe the recent Supreme Court decision on this issue resolves any questions raised by ARTBA. We believe the regulations as written are sufficient and need not be revised to address specifically the fleet concerns raised by ARTBA Regarding use and operational controls, EPA continues to believe that such controls are not preempted by section 209(e) of the Act.

* * *

## III. Summary of Petition

On July 12, 2002, ARTBA filed a petition to amend the rules implementing Clean Air Act § 209(e) ("petition"). Specifically, ARTBA requested that EPA amend its regulations "to clarify that Section 209(e) preempts state and local emission control requirements that impose in-use and operational

controls or fleetwide purchase, sale, or use standards for nonroad vehicles."

ARTBA argues that EPA's determination that use and operational restrictions on nonroad engines were not preempted under section 209(e), and the D.C. Circuit's affirmation of EPA's decision, ignored relevant statutory construction and legislative history. It also states that EPA's later rule regulating new locomotives and new engines used in locomotives, as well as decisions in courts in New York and Massachusetts concerning fleet average emission standards, as well as one in Texas on use restrictions, would have guided EPA to different conclusions concerning the scope of section 209(e).

## IV. Request for Comments and Comments Received on Petition

On May 18, 2007, EPA requested comment on ARTBA's petition as a part of a proposed rule related to control of emissions from spark-ignition nonroad engines, which also contained certain proposed changes in the regulations related to preemption of state and local standards and other requirements related to the control of emissions from nonroad vehicles and engines. 72 Fed. Reg. 28097, 28209-10.[18] EPA stated

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[18] EPA proposed to add regulatory language to implement, pursuant to section 428 of the Consolidated Appropriations Act of 2004, Pub. L. No 108-199, the restrictions on state standards and other requirements applicable to certain small spark-ignition nonroad engines and the added criteria for EPA's consideration in proceedings to authorize California standards and other requirements for such engines. EPA also proposed to move the preemption regulations from part 85 to a new part 1074 and to make minor language changes for the purposes of writing the regulations in plain language format.

> EPA is not proposing to adopt the explicit changes requested by ARTBA in its petition; however, EPA will continue to review the arguments raised by ARTBA's petition, as well as all further arguments provided by ARTBA and other commenters during the period for notice and comment on this issue. We will respond to the petition, and if appropriate, make any changes to the regulations to conform our response to ARTBA and other commenters to the final rule. We request comment from the public regarding issues related to ARTBA's petition and how we should respond.

EPA received submissions from approximately one dozen commenters that included comments related to ARTBA's petition, both supporting and opposing the petition, either in whole or in part. The commenters included representatives of states and localities, environmental organizations, manufacturers, the locomotive and railroad industry and ARTBA itself. Some commenters also addressed issues that are related to the issues in the petition, but not in the petition itself.

## V. Response to Petition and Comments on Petition

a. Summary of Response

ARTBA's petition raises two general issues of state and local preemption: whether certain state regulations on fleetwide emissions from nonroad engines are preempted, and whether state and local restrictions on use and operation of nonroad engines are preempted. Regarding the first issue, we generally agree that standards related to the control

of emissions from fleets of nonroad engines are preempted, to the same extent that emission standards on individual engines are preempted.[19] [FN 17] However, we do not believe any change in regulations is necessary. The current regulations preempt state and local standards related to the control of emissions from nonroad engines. This general language would include emission standards regulating fleets as well as individual engines or equipment. Indeed, this general language comes directly from the statute and is comparable to the general language in section 209(a) that the Supreme Court found preempted state and local fleet standards on new motor vehicles. *Engine Manufacturers Ass'n v. South Coast (EMA v. South Coast)*, 541 U.S. 246 (2004).[20] [FN 18]

One issue related to the fleet standard issue is the effect of section 209 on state and local authorities' ability to restrict their own purchasing or contracting decisions ("the market participant

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[19] We distinguish such restrictions from restrictions on use and operation, which are discussed separately.

[20] In *EMA v. South Coast*, the Supreme Court found that section 209(a) of the Clean Air Act preempted several fleet rules enacted by South Coast. The rules restricted the ability of certain public and private fleets to purchase or lease vehicles that did not meet the requirements of the rules, based on the emission levels of the vehicles or whether they were "alternative fuel vehicles," which are vehicles designed to run on alternative fuels. The court found that the rules did contain standards and did not escape preemption merely because they were directed at purchasers, not manufacturers. However, the court remanded the case to the lower courts to address certain issues not addressed below, including "whether some of the Fleet Rules (or some applications of them) can be characterized as internal state purchase decisions (and if so, whether a different standard for preemption applies)." *Id.* at 1764.

doctrine"). Regarding this issue, we note that the Court of Appeals for the 9th Circuit, in reviewing the remand of *EMA v. South Coast,* found that the Clean Air Act did not preempt state regulations that required the state and its subdivisions to purchase, procure, lease or contract for use of vehicles meeting specified air pollution criteria. 498 Fed. 3d 1031 (9th Cir. 2007). EPA agrees and believes that subsections 209(a) and 209(c) do not preempt these kinds of actions by a state directed towards the market choices of the state or its subdivisions.

Regarding state and local restrictions on use and operations of nonroad engines and vehicles, we continue to interpret section 209 and 213 as not prohibiting state and local restrictions on the use and operation of nonroad engines.

b. General Comments

EPA received comments from several commenters representing state and local entities urging in general terms that EPA deny ARTBA's petition. (Wisconsin Department of Natural Resources (OAR-2004-0008-0663); Pennsylvania Dep't of Environmental Protection (OAR-2004-0008-0676); Northeast States for Coordinated Air Use Management (NESCAUM) (OAR-2004-0008-0641); National Association of Clean Air Agencies (NACAA) (OAR-2004-0008-0651)).

EPA received detailed comments from the Association of American Railroads (AAR) (OAR-2004-0008-0669), discussed below, which includes a statement that AAR is not seeking to change the preemption provision for locomotives. Electro-Motive Diesel (EMD) (OAR-2004-0008-0687) provided comments stating that they support the comments of

AAR and reiterating that preemption of local and state standards are of vital importance to the railroad-locomotive industry, owing to the interstate nature of railroad operations. EMD urged EPA to adopt the part 1074 preemption regulations as proposed. Similarly, General Electric Transportation (GE) (OAR-2004-0008-0679) states that it supports the proposal regarding preemption with the understanding that EPA is not changing the preexisting preemption provisions. GE states that "[t]he interstate nature of [railroad] operation is more extensive than any other form of ground transport. For this reason, Congress wanted to ensure uniform national standards."

*Discussion*

As discussed in detail below, although EPA does agree in part with ARTBA's interpretation, EPA does not believe it is necessary or appropriate to revise its regulations based on ARTBA's petition. Therefore, EPA will not be revising its regulations as requested by ARTBA in this rulemaking. Regarding the comments from the locomotive-railroad industry commenters, EPA will be finalizing its proposed preemption regulations as they apply to locomotives.

c. Fleetwide Regulations

*i. ARTBA Petition*

In the cover letter to ARTBA's petition, ARTBA requests that EPA clarify that section 209(e) preempts "fleetwide purchase, sale or use standards on nonroad vehicles." In the petition itself, ARTBA refers to "fleetwide averaging, early retirement, and purchase-sale requirements." ARTBA notes that in its locomotive rule, EPA expressly includes "fleet average standards" among the "standards and other

requirements" preempted under section 209(e). ARTBA argues that since the same phrase is used to describe the preemption for other nonroad engines, state and local "fleet average standards" pertaining to other nonroad engines should also be preempted. ARTBA also notes that several federal cases have found that California fleet average requirements are standards.

*ii. Comments*

In response to ARTBA's request as it applies to fleet requirements, South Coast Air Quality Management District (South Coast) states that to the extent ARTBA's request goes to fleetwide regulation of use or operation, they are not preempted (see discussion in subsection d. below). South Coast noted that the Circuit Court cases mentioned by ARTBA and in the locomotive context, the standards were applicable to manufacturers, or at least, in the case of the locomotive regulations, were considered to affect manufacturers of locomotive engines. South Coast noted EPA's reasoning that the locomotive industry was different from other nonroad industry, both in terms of the factual setting of the industry, including the limited number of customers, and policy concerns unique to locomotives. South Coast also notes that EPA has in the past approved fleetwide requirements on airport ground control equipment that required specific numerical reductions from the fleetwide emissions.

Regarding fleetwide purchase-sale requirements, South Coast quoted a 2001 EPA statement that standards under section 209(a) and (e) are quantitative limits that are typically met through modifying or changing the engine or equipment

itself, not through controlling how the equipment is operated in-use. South Coast noted the decision of the Supreme Court in *Engine Manufacturers Ass'n v. South Coast (EMA v. South Coast)*, 541 U.S. 246 (2004), which found that certain of South Coast fleet purchase requirements were preempted emission standards, but stated that the decision does not mean that all purchase or sale requirements were preempted. In particular, South Coast noted that the Supreme Court did not decide whether a different standard for pre-emption applies to fleet rules that can be characterized as internal state purchase decisions and that the issue was pending in the 9th Circuit Court of Appeals. South Coast also noted that it was the *amicus curiae* brief of the United States government that first raised the "market participant" issue in the Supreme Court case. South Coast also noted that the Supreme Court decision applied only to state requirements defined to be standards and the other requirements specified in section 209(a). Therefore, South Coast said that fleet requirements that do not pertain to the emissions characteristics of the fleet, like Los Angeles's requirement that airport taxicabs be no more than seven years old, which aids the safety and image of the airport taxicab fleet, would not be preempted.

South Coast similarly argued that even if some fleet requirements are preempted, for instance those that require the newest vehicles to be purchased, not all "early retirement" rules would be preempted. South Coast noted that nonroad equipment is often used for very long periods of time. South Coast suggests that rules that required very old nonroad engines to be retired but did not require new engines

to be purchased would not be a preempted standard under the Supreme Court decision.

New York Department of Environmental Conservation (NYDEC) (OAR-20040008-0659) states that ARTBA's claims that fleet average emissions standards for owners and operators of construction equipment fleets should be preempted because federal courts have held that fleet average standards for light duty vehicles constitute "standards" under the Clean Air Act is factually incorrect. NYDEC states that California Low Emission Vehicle light duty regulations apply to new motor vehicles, and the term "fleet" refers to a manufacturer's model year sales. NYDEC states that this is a far cry from the fleet of engines and vehicles owned or operated by a construction firm.

In its comments, ARTBA stated that clarity is needed to avoid conflicting state regulations. ARTBA stated that the decision in *EMA v. South Coast* controls this decision and that if locomotive fleet standards are preempted, so must construction-equipment fleet standards. ARTBA stated that there should be no presumption against preemption in this situation, because the statute is clear on its face and because there is a long history of broad federal preemption, at least with regard to locomotives. ARTBA also states that the Supreme Court found that South Coast's fleet rules conflicted with section 246 of the Act, which created requirements applicable to certain motor vehicle fleets. ARTBA acknowledges that section 246 applies only to motor vehicles, but states that this provision underscores section 209's express preemption of Fleet Rules as standards under section 209.

ARTBA states that it is well settled that states are completely preempted from regulating "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," citing *Napier v. Atlantic Coast Line*, 272 U.S. 605, 611-613 (1926). ARTBA states that EPA handled preemption of locomotive regulations differently than preemption of regulations for other nonroad engines – "which spring from the same words in the same section of the same statute - and that it is "untenable" that EPA treated locomotives differently from other nonroad engines, particularly small farm and construction equipment. ARTBA also states that the legislative history of section 209(e) [i.e. Rep. Dingell's statement regarding state regulation of locomotive operations and the House Report's note that section 209(e) did not apply to existing nonroad engines] show that state controls should be preempted for the vehicles' useful lives. ARTBA also states that its interpretation conforms to section 209(e)'s preemption for CAA-regulated parts during their useful life and section 213(a)(3)'s requirement that EPA regulations apply to vehicle's useful life. In any event, ARTBA notes that EPA's locomotive rule expressly includes "fleet average standards" among preempted standards, indicating that such standards would also be preempted for other nonroad engines.

Regarding the market participant exception, ARTBA says that at least where the states would impose criminal or punitive civil penalties, the "market-participant" exception cannot apply. ARTBA also claims that preemption under the Supremacy Clause need not include a market-participant exception. ARTBA also argues that any nonroad

controls that are "proprietary" would not be protected under Clean Air Act section 116, which protects state rights to promulgate standards and other requirements respecting control or abatement of air pollution.

ARTBA also states that three Supreme Court cases negate the presumption against preemption regarding dormant police power authority that states have not exercised and allow conflict preemption notwithstanding a savings clause and express preemption.

*iii. Discussion*

1. Preemption of State and Local Fleet Regulations In General

EPA believes that any state or local regulations that are "standards or other requirements relating to the control of emissions from [nonroad] vehicles or engines" as EPA interprets that term in section 209(e), are preempted whether they apply to individual vehicles or engines or to fleets. Thus EPA agrees that fleet average standards (e.g., standards that require a manufacturer or construction company to ensure that the company's fleet meets a particular average numerical level) are preempted. EPA also agrees that regulations that impose emission levels or design requirements on the purchase or sale of nonroad engines in fleets are preempted. The *amicus curiae* brief of the United States government in *EMA v. South Coast,* and the court's decision in that case, made this point in the context of section 209(a) and the South Coast's restrictions on the purchase decisions by operators of certain motor vehicle fleets.

EPA also agrees that the scope of preemption in section 209(e)(2), as it applies to "other" nonroad

vehicles and engines, is broader than the scope of preemption in section 209(a), which applies only to *new* motor vehicles and motor vehicle engines. Thus, contrary to the comments from NY DEC, the preemption on fleet standards does apply to standards applicable to fleets of in-use construction equipment.

However, EPA does not believe that regulations restricting the use and operation of nonroad fleets are preempted by section 209(e). As discussed in section V.d. below, EPA continues to interpret section 209(e) as not preempting state and local restrictions on the use and operation of nonroad engines or vehicles. In addition, as discussed below, certain state or local requirements may be covered by the "market participant" doctrine, and may avoid preemption as a result.

EPA does not believe it is necessary or appropriate to revise its regulations regarding the preemption of "standards or other requirements relating to the control of emissions from [nonroad] vehicles or engines" to state explicitly that fleet standards are preempted. As ARTBA has noted, the Supreme Court and two Courts of Appeals have found that fleet standards are preempted. The language in section 209(a) leading to those decisions did not contain, and did not need to contain, any explicit reference to fleet average standards. The language currently in EPA's regulations basically mirrors the language in the statute, and EPA believes that no further specification is necessary.

Further, EPA believes that it is not appropriate to revise the regulations to identify every type of state or local standard or other requirement that is

preempted under section 209(e). It would be impossible to specify every specific type of standard or other requirement that is preempted under section 209(e). Moreover, if we were to identify some types of standards that were preempted but not include others, it might be incorrectly interpreted as implying the types of restriction that are not identified are not preempted. Finally, in many cases, the determination of whether a regulation is preempted may need to be reviewed on a case-by-case basis, in which case a list of categories of standards that are either preempted or not preempted may be overinclusive or underinclusive.

Regarding state and local fleet rules that require "early" retirement, EPA agrees with South Coast that, though some rules that require early retirement may be preempted, not all requirements to retire nonroad equipment are necessarily preempted. For example, rules that, similar to the Los Angeles airport taxi fleet requirement, are designed to protect interests like public safety, would not be covered by the preemption if they are not "relating to control of emissions." In addition, the specific details of an early retirement provision would have to be carefully reviewed to determine whether it has the characteristics of a standard or whether it is appropriately treated as a restriction on use or operation. EPA need not rule today on the particular circumstances where such rules would or would not be preempted. We believe that such rules should be reviewed individually.

Regarding ARTBA's claim that EPA has treated locomotives differently from other nonroad engines, EPA notes that on the issue of whether fleet standards are preempted under section 209(e), there

is little if any difference. Such standards are preempted as they apply to all nonroad engines.

EPA has provided more specificity in its rules with regard to preemption of state and local regulation of locomotives, but that resulted from the special and particular circumstances regarding locomotives in the statute and noted in the rule, in comments from others, and in ARTBA's own comments.

For example, uniquely among nonroad engines, there is a long history of preemption of state and local regulation of locomotives, and daily locomotive operations entail interstate travel to much greater degree than other nonroad operations. Additionally, class I railroads, which are generally the only buyers of freshly manufactured locomotives and are few in number, have a large input in the design of such locomotives. Also, the particular facts regarding remanufacturing of locomotive engines led EPA to promulgate a somewhat different, and heretofore unprecedented, definition of "new" with regard to locomotives than was applicable to other nonroad engines. In addition, section 209(e) distinguishes the preemption of state and local standards for new locomotives from state and local standards regulating other locomotives. Under section 209(e)(1), California cannot receive authorization from EPA to enact and enforce standards regulating new locomotives, but under section 209(e)(2), California can receive such authorization for standards regulating other locomotives and other states can then adopt California's standards.[21] [FN

[21] Only new engines in farm and construction equipment at or below 175 horsepower have a similar protection, and the

19] Given these and other factors, which led to greater uncertainty and sensitivity regarding the limits of preemption of such regulation, EPA determined for that particular industry, with its particular facts, that it was necessary and appropriate to provide more specificity regarding the particular types of state and local standards that were preempted under 209(e)(1) and could not receive a waiver of preemption.

The primary issue addressed by the locomotive regulation at 40 CFR 85.1603(e) is what standards are appropriately treated as standards relating to the control of emissions from new locomotives, and therefore prohibited under section 209(e)(1), as compared to (e)(2). EPA determined that certain standards on in-use locomotives (which are not "new" locomotives) would be preempted under 209(e)(1) because of their effect on the manufacture of new locomotives. This is an extension of the logic of *Allway Taxi v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd.* 466 F. 2d 624 (2d Cir. 1972), which has long been endorsed by EPA and is discussed in depth below in section V.d. What made this provision somewhat unique was, among other things, the specificity EPA provided in determining the duration of preemption, the conclusion regarding the length of preemption, and the conclusion that such a standard on a fleet of in-use locomotives should categorically be considered a standard relating to the control of emissions of *new* locomotives. Thus, the reference to

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particular circumstances meriting a different definition of "new", and more specified preemption regulations, for locomotives, discussed below in subsection V.d., have not been shown for small farm and construction equipment.

"mandatory fleet average standards" was not premised on the view that a fleet average standard should be considered a standard for locomotives but not other nonroad engines or equipment. It was instead premised on the view that the unique characteristics associated with locomotives meant that a fleet average standard applicable to in-use locomotive fleets should categorically be preempted as a standard related to the control of emissions from new locomotives.

Again, however, with regard to the issue of "fleet standards," there is little difference regarding EPA's position regarding initial preemption of such standards for locomotives as compared to other nonroad engines, and any differences relating to California's ability to receive authorization to enact and enforce such standards on "new" locomotives result from explicit differences in the statute and the unique circumstances and definition of "new" promulgated for locomotives.

2. The Market Participant Doctrine

Regarding whether a state or local restriction that applies only to the state or locality as a market participant is preempted, South Coast observed that the U.S. government introduced this issue in the *EMA v. South Coast* case in its *amicus curiae* brief, at page 29[22] [FN 20] In that brief, the U.S. government noted that "the State of California may be entitled to place restrictions on the types of new public vehicles that the State and its instrumentalities purchase for their own use," citing *Building & Construction Trades Council of Metro.*

[22] The brief has been placed in the docket for this rulemaking.

*Dist. v. Associated Builders & Contractors*, 507 U.S. 218, 231-232 (1993) ("In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.").

The Supreme Court's decision in that case explicitly held open the question of whether some portion of South Coast's fleet rules "can be characterized as internal state purchase decisions (and, if so, whether a different standard for pre-emption applies)," *EMA v. South Coast*, 124 S. Ct. at 1764, and remanded the case to the lower courts to address this issue.

The Court of Appeals for the 9th Circuit issued an opinion on this issue since the close of the comment period in this rulemaking. *EMA v. South Coast*, 498 F. 3d 1031 (9th Cir. 2007). That court found that "the Clean Air Act does not preempt South Coast's fleet rules as they direct the procurement behavior of state and local government entities." *Id.*, at 1039. The court referred to several Supreme Court and Court of Appeals cases that discuss the "market participant doctrine," which "distinguishes between a state's role as a regulator, on the one hand, and its role as a market participant, on the other. Actions taken by a state or its subdivision as a market participant are generally protected from federal preemption." *Id.*, at 1040.

The Court of Appeals found that section 209(a) does not preempt "provisions directing state and local governmental entities to purchase, procure, lease or contract for use of vehicles meeting specified

air pollution criteria." *Id.*, at 1046. The court noted that nothing in the statute or legislative history indicated that Congress intended preemption under section 209(a) to apply to state proprietary action. *Id.* at 1043.

EPA does not believe it is necessary to specify in detail all of the boundaries of preemption in every possible situation that may present itself. We believe the courts are well equipped to make such case-by-case determinations. However, we believe that in the circumstances presented by the EMA case, the determinations of the Court of Appeals appear reasonable and EPA agrees that subsections 209(a) and 209(e) do not preempt actions by a state directed towards the market choices of the state or its subdivisions.

ARTBA states that the market participant doctrine should not apply to provisions where the state would impose criminal or punitive civil penalties. The Court of Appeals rejected this argument, stating "we do not see how action by a state or local government that is proprietary when enforced by one mechanism loses its proprietary character when enforced by some other mechanism." *Id.* at 1048. EPA understands ARTBA's argument as it would apply to private entities, but believes the question is more complex regarding state and local entities. EPA takes no position on this issue and believes the courts would be the best arbiter of this issue.

d Restrictions on Use and Operation

*i. ARTBA Petition*

ARTBA's initial petition requesting revision to EPA's nonroad preemption regulations raised several

issues that ARTBA believes should lead EPA to change its interpretation that section 209 does not preempt state and local regulations of use and operation of nonroad vehicles, engines and equipment. ARTBA noted that the language in section 209(e), which refers to "any standard or other requirement relating to the control of emissions" is broader than the reference to "any standard relating to the control of emissions" in section 209(a), and that section 209(d) on its face applies only to state power to control and restrict the use, operation or movement of motor vehicles. ARTBA notes the decision of the Court of Appeals upholding EPA's interpretation in *EMA v. EPA*, but ARTBA believed that the statute and legislative history resolves any ambiguities and compels its interpretation.

1. Section 213(d)

ARTBA states that since section 209(d) refers only to motor vehicles, the reference to section 209 in section 213(d) does not apply section 209(d) to nonroad engines. ARTBA also says that to the extent that section 213(d) does import state authority over in-use nonroad vehicles, it would only do so for new nonroad vehicles, not non-new nonroad vehicles, because section 213 refers only to regulation of new nonroad engines. ARTBA states that it would be illogical to allow states to regulate use only of new nonroad engines, given EPA's definition of new, under which nonroad engines cease to be new when they leave the showroom floor.

ARTBA also states that the legislative history provides the simplest meaning for harmony within the statute. ARBA notes that the "subject to 209" language in section 213(d) and "any standard or

other requirement" language in section 209(e) were both in the pre-conference House of Representatives bill. The House bill preempted only state and local standards and other requirements for new nonroad engines and directed EPA to issue standards for such new nonroad engines. ARTBA notes the language in House Report 101-490, quoted above, indicating that the preemption did not apply to existing nonroad vehicles and engines. ARTBA states that the language in section 213(d) was meant to show that the preemption applies to those new nonroad engine standards that EPA issues under section 213. ARTBA also notes that the language in the final Clean Air Act Amendments did not change the language in 213(d), but it did change the language in section 209(e) to address both new and non-new engines.

ARTBA also notes that the statements of individuals Senators, like those of Senators Baucus and Chaffee indicating their view that states retained the authority to regulate in-use operational requirements, are an unreliable guide to congressional intent.

2. "Other Requirements" and "Take Such Actions"

Section 209(e)(2)(A)'s implied preemption language refers to "standards and other requirements relating to the control of emissions." Section 209(e)(2)(B)'s provision allowing states to adopt and enforce authorized California standards refer to "standards relating to control of emissions from nonroad vehicles or engines ... and ... such other actions as are referred to in subparagraph (A) of this paragraph respecting such vehicles or engines if (i)

such standards and implementation and enforcement are identical, for the period concerned, to the California standards authorized by the Administrator under subparagraph (A)...."

ARTBA states that the language in section 209(e)(2)(B) should not be read to narrow the scope of section 209(e)(2)(A) because the different language should be read to mirror the language in section 209(e)(2)(A) and was probably used to avoid ambiguity regarding whether states other than California could adopt "other requirements" other than California requirements.

3. Locomotive Preemption

ARTBA also noted that states have long been preempted from regulating "the design, the construction and the material of every part of the locomotive." ARTBA says that section 209(e) legislates in an area where states historically have not exercised police power. ARTBA claims that there might have been some plans in California for regulation of nonroad engines, but that no such regulation had occurred by 1990. Instead, ARTBA states that, at least with regard to locomotives, there has been a broad history of federal preemption. ARTBA believes that the presumption against preemption therefore should not apply in this instance.

*ii. Comments*

South Coast states that ARTBA is seeking an immunity that is unavailable for any other source. Regulation of the use and operation of stationary sources and motor vehicles is undisputed. State and local regulation of the use and operation of nonroad engines is essential to meet national ambient air

quality standards. South Coast states that if these engines cannot be regulated adequately, other sources will need to be even more stringently regulated. ARTBA articulated no policy reason why nonroad sources should be treated differently than other sources in this respect.

South Coast claims that the primary purpose of the preemption provisions is to protect manufacturers from having to design different types of vehicles for each state or local authority. According to South Coast, the Supreme Court's decision in *EMA v. South Coast* confirmed that the preemption provisions went to the design features of the engine. *See EMA v. South Coast*, 541 U.S. 246, 124 S. Ct, 1756, 1761. Nothing in the legislative history indicates that the purpose behind nonroad preemption was different than that for motor vehicle preemption. Indeed the legislative history indicates that use and operation restrictions were not intended to be preempted.

South Coast notes that regulations on use and operation are not standards under section 209, and that ARTBA does not argue that they are standards. South Coast further states that the use of the word "requirements" in section 209(e) does not dictate that any regulation affecting emissions is necessarily preempted. According to South Coast, ARTBA ignores the principle of statutory interpretation that like words used in different parts of the statute should be treated as having the same meaning. The words "require" and "requirements" in section 209(a) and (e) refer to certifications, inspections and other administrative requirements related to emission levels, not to restrictions on use and operation. In 1994, EPA read the word "requirements" in section

209(e) to apply to the same types of requirements as in sections 209(a) and (c), and that interpretation was upheld as reasonable by the Court of Appeals. Moreover, South Coast notes that the language in section 209(e)(2)(B), allowing states other than California to promulgate standards and "take such other actions as are referred to in subparagraph (A)" if "such standards and implementation and enforcement are identical." The scope of section 209(e)(2)(B) would need to be the same as that in section 209(e)(2)(A), as the state provisions must be identical to California provisions and because subparagraph (B) refers back directly to "actions as are referred to in subparagraph (A)." Therefore, the reference to "standards and implementation and enforcement" must have been a reference back to the "standards and other requirements" in subparagraph (A).

South Coast states that the absence of a clear statement that section 209(e) does not preempt restrictions on use and operation of nonroad engines can be explained by the fact that, unlike in 1967, when section 209(a),(b) and (d) was added and Congress wanted to be explicit that the language in subsection (a) did not preempt use and operation restrictions, by 1990 it was clear, through administrative and judicial precedent, that use and operation restrictions were not preempted, so no explicit language was necessary.

South Coast also notes that the legislative history supports the interpretation that use and operational restrictions were not preempted. South Coast notes the statements of Senators Baucus and Chafee that the preemption does not apply to operational restrictions. South Coast says that none

of the statements cited by ARTBA supports the argument that use or operational restrictions are intended to be preempted. Thus, the only legislative history that speaks to this point supports the interpretation that use and operational restrictions are not preempted.

South Coast also states that there is no long history of preemption regarding regulation of use of locomotives, only locomotive design. For example, state regulation on the use of whistles has been held to not be preempted. EPA's own regulations base the scope of preemption on the effect of state and local regulation on locomotive design. South Coast notes EPA referred to "real and concrete effects on the design and manufacture of new locomotives and new locomotive engines," not trivial effects. EPA's justification for the broader preemption on regulation of locomotives still tied such preemption to effects on the manufacturer, because "state requirements on railroads are much more likely to effect changes in how manufacturers and remanufacturers design new locomotives and new locomotive engines than would similar requirements on end users of other mobile sources." South Coast states that vehicle and engine design is unaffected by use regulations.

South Coast argues that preemption should be narrowly construed because the exercise of local police power serves the overriding purpose of the CAA, to clean the air, citing EPA's 1994 rule and *Allway Taxi v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd*. 466 F. 2d 624 (2d Cir. 1972). South Coast also notes that even if section 209 can be seen in isolation as expressing a principle in favor of national regulation, use and operational controls are

not the type of regulations that needs to be national in scope.

South Coast also argues that the presumption against preemption does apply in this case because there is no long history of preemption of state and local regulations of use and operation, even with regard to locomotives, and certainly not with regard to other nonroad engines. Indeed, South Coast states that local use regulations, in the form of limits on hourly use, have a substantial history.

South Coast states further that applying preemption to use restrictions would make no sense because only California could then adopt regulations on the use of nonroad engines and other states would need to promulgate identical regulations to regulate use and operation. Yet the appropriateness of such use regulations depends on local conditions, as recognized by both EPA and the court in *EMA v. EPA*. Unlike regulations affecting vehicle design, which could require manufacturers having to make fifty different versions of the same engine, local use regulations do not threaten national uniformity needed for manufacturers because they do not restrict the design of the engine and operators can meet different use restrictions in different states without the requirements in one state affecting their ability to meet the requirements in other states. National uniformity is not only unnecessary; it is counterproductive. Moreover, since the preemption provision in section 209(e)(2)(A) is implied, it should not be extended beyond the reach clearly required by the statute. South Coast also notes that the opinion of the district court in *EMA v. Huston*, 190 F. Supp. 2d 922 (W.D. Tex. 2001) (*vacated as moot*, 2002), on

which ARTBA relies, is simplistic, not well reasoned and should carry no weight.

South Coast also argues in particular that section 209(e) does not preempt state and local fuel requirements. South Coast notes that section 211, not section 209, governs preemption of state fuel regulation. If Congress had wanted to preempt state and local regulation of nonroad fuels, it would do so in the section of the statute devoted to preemption of state and local fuel requirements. South Coast also notes that the decision of the Supreme Court in *EMA v. South Coast* does not encompass fuel requirements, which can be met by using a different fuel and do not require changes in vehicle design.

NYDEC stated that the provisions of section 209(e) apply only to new engines and therefore should not prohibit use and operational controls on in-use engines.

NYDEC also says that ARTBA is incorrect in stating that there is no history of controlling air pollution sources and says there is a long history of states protecting the public from air pollution sources.

In comments filed collectively by Natural Resources Defense Council, Environmental Defense, Friends of the Earth and Coalition for Clean Air (hereinafter collectively referred to as NRDC), NRDC states that ARTBA's interpretation of section 209(e) to preempt all state and local regulation of nonroad engines is in direct conflict with the court decision in *EMA v. EPA*. NRDC states that the express reservation of authority to states and localities in section 209(d) to regulate the use and operation of registered and licensed vehicles should defeat any

argument that state controls on older vehicles should be found impliedly preempted. NRDC notes that states' authority to regulate emissions in a manner that does not unduly burden manufacturers has been recognized since the initial days of section 209, citing *Allway Taxi*. The commenter also notes that nothing in *EMA v. SCAQMD* suggests that voluntary programs are preempted under section 209. The commenter notes that the Clean Air Act puts primary responsibility for achieving clean air on states and localities, and states rely on their ability to regulate use and operation of nonroad sources to meet this responsibility.

With regard to preemption of state and local restrictions on the use and operation of nonroad engines and vehicles, the commenter notes that the D.C. Circuit's decision in *EMA v. EPA* upheld EPA's interpretation that such restrictions are not preempted by section 209(e) and that section 209(d) was incorporated into the nonroad regime.

NRDC states that EPA should not ignore the presumption against preemption. Regulating sources of air pollution, like nonroad sources, falls squarely within the historic police powers of states. There is no broad history of federal preemption. The federal government did not regulate nonroad engines. California has regulated nonroad engines. ARTBA's attempt to equate locomotives to other nonroad engines "flies in the face of recent statements in a brief before the D.C. Circuit where [ARTBA] noted that only locomotives have had a long history of federal preemption and its statement that locomotives are treated differently than other nonroad engines under section 209(e)."

The California Air Resources Board (CARB) noted that more than ten years after EPA's determination that state and local nonroad use restrictions are not within the scope of preemption under section 209(e), and the D.C. Circuit's affirmation in *EMA v. EPA*, ARTBA is requesting reconsideration of that determination, claiming that all nonroad engines, including those in lawnmowers and string trimmers, be treated similarly to locomotives, which CARB claims is not supported by fact or logic.

CARB noted the D.C. Circuit's conclusion that EPA was reasonable in determining that the use of the word "requirements" should have the same meaning as similar uses of the word in section 209, which refer to enforcement provisions that cannot be used as conditions precedent to sale, registration or titling of a vehicle. The Court further found plausible EPA's interpretation that section 213(d), read with section 209(d), limited the scope of preemption for nonroad engines as section 209(d) on its own limits the scope of preemption for motor vehicles. CARB also noted the Court's favorable language regarding EPA reliance on the contemporaneous statements of Senators Baucus and Chafee regarding the continued ability of the states to regulate the use of nonroad vehicles and EPA's view that the inherently local nature of use restrictions would conclude against requiring every other state to follow California's lead on this issue.

CARB states that while the Court was not entirely satisfied with EPA's interpretation of sections 209(e) and 213(d), the Court found EPA's explanation much more persuasive that EMA's interpretation.

CARB notes that, regarding the presumption against preemption, the Supreme Court has recognized that preemption is a question of Congressional intent and that federal law will only preempt state law when Congress has expressly so declared or when it may reasonably be inferred by Congress's actions to totally occupy the field or when actual conflict would exist between state and federal law. According to CARB, courts have held that where exercise of the local police power serves the purpose of the federal Act, the preemptive effect of that Act should be narrowly construed. CARB states that the preemption issue here is narrow: whether state and local in-use operational controls, which have historically been within the purview of local government, are preempted. Prior to 1990, there was no history of federal preemption in this area. Most districts in California have long required operators of nonroad internal combustion engines to have permits for portable engines. Permitting requirements typically include, among other things, in-use operational controls.

CARB states that ARTBA is trying to reargue an issue that was already decided in *EMA v. EPA*, i.e. the reasonableness of EPA's defining new nonroad engine consistently with the definition of new motor vehicle in section 216 of the Act. CARB states that the D.C. Circuit already rejected ARTBA's claim that "new nonroad engine" must refer to all engines built after the 1990 enactment of the Clean Air Act Amendments.

CARB claims that a more plausible reading of sections 209(e) and 213(d) is that EPA must be cognizant when adopting standards under section 213(a) that it not adopt in-use operational control

requirements, which Congress kept in the hands of states pursuant to section 209(d). CARB agrees that Congress could not have intended California to establish in-use operational controls for the nation. Indeed, CARB has not generally even established such requirements in California, because such requirements are best handled locally to address the specific requirements of the different air basins within the state.

CARB states that the 1998 locomotive rule should have no bearing on EPA's interpretation regarding in-use operational controls. In arguing that EPA has fashioned a broader preemption for locomotives than for other nonroad engines, ARTBA tries to bootstrap the unique regulatory history of railroads to all nonroad engines. But even ARTBA acknowledges that only locomotives have a long history of preemption and that Congress distinguished regulation of new locomotives from other nonroad engines under the Act. EPA's locomotive rule considered and reasonably explained the special circumstances for providing a broader preemption for locomotives compared to other nonroad engines, including the special relationship between railroads and engine manufacturers, the periodic remanufacturing and long total life of locomotive engines, the environmental benefits of federal regulation, and the history federal preemption of railroads and significant potential economic burdens that could be placed on the railroad industry by state and local regulation of locomotive engines.

OPEI commented that it supported ARTBA's petition calling on EPA to clarify the pre-emption of state and local requirements that impose in-use and

operational controls on nonroad engines. OPEI states that there is currently a proliferation of illegal emission-related use bans and purchase restrictions applicable to blowers and other outdoor power equipment. OPEI states that EPA should finalize regulations stating that EPA will not approve state implementation plans restricting the sale or use of EPA-certified products. OPEI notes that section 209(e) refers to "any standard or other requirement." It notes that technology-forcing requirements imposed on the purchaser or user of equipment is a preempted "standard," citing to *EMA v. South Coast*, and providing the following quote from the case: "a standard is a standard even when not enforced through a manufacturer-directed regulation." OPEI also notes the court's finding that if one state can enact "such rules" so can any other, "and the end result would undo Congress's carefully calibrated regulatory scheme." OPEI also discussed the opinion of the court in *EMA v. Huston*, which rejected Texas's attempt to regulate use of certain nonroad engines.

In its comments following the NPRM, ARTBA states that the language of section 209(e), referring to preemption of "*any* [state or local] standard *or* other requirement *relating to* the control of emissions" from new construction equipment under 176 horsepower, indicated expansive preemption. ARTBA notes the reference to the implied preemption of state and local "standards and other requirements" in section 209(e)(2). ARTBA states that in-use controls clearly fall within this language. ARTBA distinguishes the language from section 209(a-d), which references state and local standards and various specified requirements, and includes an

express savings clause that retains state authority over the use, operation and movement of motor vehicles. ARTBA notes the lack of an express savings clause for state authority over in-use nonroad vehicles. ARTBA notes that only section 209(e) applies to nonroad engines and vehicles, and that the rest of section 209 is inapposite. ARTBA claims the language of the statute is plain but states that to the extent legislative history is considered, the House Report is the appropriate history.

ARTBA states that the court upheld EPA's interpretive rule primarily because of EPA's definition of "new," section 209(e) inconsistent use of "standards or other requirement," and EPA's plausible interpretation of section 213(d), in the absence of other satisfactory interpretation, to read section 209(d) to include regulations on the use of nonroad engines.

ARTBA notes that while EPA defined "new" to mean "showroom new," for the purposes of most nonroad engines, harmonizing that definition with the definition of "new" for motor vehicles, it defined "new" differently for locomotives. ARTBA claims that "new" for locomotives extends back to 1972 and out to 1.33 times an engine's life.[23] [FN21]

ARTBA states that the *EMA* panel thought it significant, and supportive of a narrow reading of requirements, that section 209(e)(2)(B) does not

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[23] To avoid confusion, EPA notes that this is not the definition of "new" for locomotives. That definition can be found at 40 CFR § 92.2. The reference by ARTBA is to the preemption regulation at 40 CFR 85.1603(c), which determines that certain standards on in-use locomotives will be preempted as standards relating to the control of emissions from new locomotives. That is a different issue from the definition of new locomotive.

authorize states other than California to promulgate "other requirements." ARTBA states that "take such other action" is clearly a double for "adopt...other requirements." ARTBA also notes the *EMA* court's acceptance of EPA's argument that the difference between "standards and implementation and enforcement" in section 209(e)(2)(B)(i) and "standards and other requirements" in section 209(e)(2)(A) allows a narrow interpretation of "other requirements." ARTBA, however, states that this language does not limit section 209(e)(1)'s scope and that the implementation-and-enforcement language appears section 209(e)(2)(B)(i)-(ii), which concerns leadtime restrictions on states' adopting "standards" not other requirements, but does not limit section 209(e)'s broader preemption of other requirements. ARTBA also notes that the language of the Bond amendment (Pub.L. 108199, section 428) tracks the "standards or other requirements" language, not "standards and implementation and enforcement" language.

ARTBA notes the court's deference to EPA's interpretation that section 213(d)'s reference to section 209 incorporates section 209(d)'s savings clause into nonroad preemption. ARTBA states that the court failed to consider that, by its terms, section 213(d) applies only to EPA's new vehicle standards under section 213(a). Thus, section 209(d) could save states' authority to impose in-use restrictions on new nonroad vehicles, which makes no sense. This shows that EPA's interpretation is even more unsatisfactory than held in *EMA v. EPA*. Because, according to ARTBA, the court held that EPA's interpretation can prevail because if neither party offers an acceptable interpretation, ARTBA states

that the legislative history explains section 213(d)'s connection to section 209(e). According to ARTBA, section 213(d) linked new vehicles "subject to regulation under this Act" – but not then-existing (i.e. unregulated) nonroad vehicles – to section 209(e)'s preemption and because it did not amend section 213(d), the Conference Committee did not change section 213(d)'s simple meaning. According to ARTBA, any ambiguity in the section 209(e)-213(d) link concerns post-enactment, pre-regulation vehicles, but that minor temporal ambiguity cannot empower EPA to re-write the unambiguous aspects of the link (namely that CAA-regulated nonroad vehicles are subject to section 209(e)'s preemption). ARTBA also states that nonroad vehicles include the vehicle's fuel system.

ARTBA also claims that EPA allows California to mandate a retrofit of a nonroad engine immediately after the engine is no longer new, which EPA recognized conflicted with Congressional intent, and should therefore be rejected. Also, according to ARTBA, the Supreme Court's decision in its fleet litigation, because it is not limited to manufacturers, includes those imposed on in-use vehicles. ARTBA notes that the House conferees understood that section 209(e) reached the operation of nonroad vehicles, citing to Rep. Dingell's remark that "we balanced the need to control emissions from new locomotives against our belief that State efforts to regulate locomotive emissions or operations would impose an unconstitutional burden on interstate commerce." According to ARTBA, Congress long ago abrogated the *Allway Taxi* decision. The in-use retrofit "requirements" that ARTBA claims are preempted by section 209(c) unquestionably fall

within the "any...other requirements" preempted by section 209(e).

ARTBA also noted the decision of the court in *EMA v. Huston,* 190 F. Supp. 922 (W.D. Tex. 2001), *vacated as moot*, in which the court concluded that "the legislative history and plain language of section 209(e) are clearly inconsistent with EPA's offered interpretation." ARTBA also noted EPA's response to the decision of the court, which EPA referred to as an "inappropriate collateral attack on [EPA]s] regulations." 66 Fed. Reg. 57,223 (2001).

AAR commented that it believes that, in the context of *EMA v. EPA*, EPA can have broader preemption rules for locomotives than it does for other nonroad engines. AAR notes that the court in *EMA v. EPA* upheld EPA's interpretation that "requirements" refers to certification, inspection and approval requirements and does not encompass use restrictions. AAR states that EPA can reach different conclusions for different engines as to what constitutes an engine standard or a use restriction.

AAR states that what is preempted under section 209 depends on factual circumstances and the determination needs to be made on a case-by-case basis. "The broad regulatory language on preemption of state regulation of locomotives is consistent with *EMA v. EPA*. Furthermore, the fact that different language is used to describe preemption of state regulation of locomotives, as opposed to other nonroad engines, is appropriate because of the different standards applicable to locomotives. AAR states that indeed, when issuing the current preemption regulation for locomotives, EPA explained that 'because of compelling factual and

policy considerations relating to regulation of locomotives as compared to regulation of motor vehicles and other nonroad vehicles and engines, the implementation of these [preemption] principles would be expected to differ to a significant degree.' EPA pointed to the different regulatory requirements for locomotives, the unusual marketplace for locomotives, and the railroads' unique operating environment as the basis for the preemption rule."

AAR noted EPA's discussion of differences such as: 1) the remanufacturing requirements for locomotives, and the fact that such remanufactured engines would be considered new engines under the regulations, which has an effect on preemption of retrofit requirements because a retrofit requirement that would have little or no effect on the original manufacture of a locomotive could have a significant effect on the remanufacture of that locomotive; 2) the small marketplace for locomotives, with the vast majority of new locomotive sales taking place between seven Class I railroads and two manufacturers, which results in manufacturers needing to be much more responsive to changes in design requested by customers, which means that state requirements on railroads are much more likely to affect the design of new locomotives that would similar requirements on end users of other mobile sources; 3) the interstate nature of railroad operations, which provides compelling policy reasons that support uniform, national regulation of locomotive emissions, as indicated by the legislative history of section 209(e), which singles out state efforts to regulate locomotive emissions as imposing burdens on interstate commerce, but not making similar statements regarding state regulation of any

other category of nonroad vehicles. AAR also notes EPA's mention of possible undue burdens on interstate commerce under the Commerce Clause of the Constitution, and AAR notes a recent federal court decision holding that the ICC Termination Act preempted state and local emissions regulations on locomotives. *AAR v. South Coast AQMD*, No. 06-01416 (C.D. Cal April 30, 2007).

*iii. Discussion*

1. Overview

EPA continues to believe that Congress did not intend to preempt state and local regulation of use and operation of nonroad engines under section 209(e) of the CAA. ARTBA points to no language in the statute or in the legislative history showing any specific intent to preempt state and local regulation of use and operation of nonroad engines. While the statutory language of the CAA is not altogether clear on the issue, the textual arguments relied upon by EPA in its prior rulemaking continue to be more persuasive than ARTBA's arguments, and the legislative history contains clear language indicating a desire to allow state and localities to continue to regulate use and operation of nonroad engines. Because section 209(e) as it was promulgated was very different from the language in either the Senate or the House of Representatives, and there is little legislative history specific to this provision in the final conference report, there is not much legislative history of this provision. But the statements of two Senators during the final debate on the bill indicate clearly their understanding that states and localities were not preempted from regulating the use and operation of nonroad engines. Sen. Baucus, in his

explanation of the final bill, styled as a Clean Air Conference Report, stated:

> States also fully retain existing authority to regulate emissions from all types of existing or in-use nonroad engines or vehicles by specifying fuel quality specifications, operational modes or characteristics or measures that limit the use of nonroad engines or equipment.

136 Cong. Rec. S16976 (October 27, 1990).

> Similarly, Sen. Chafee stated:
>
> States can continue to require existing and in-use nonroad engines to reduce emissions by setting fuel requirements, operational restrictions or limits on the use of such equipment.

136 Cong. Rec. S17237 (October 26, 1990).

Indeed, though the statutory language in the House of Representatives' bill was not adopted, it is worth noting that even the House of Representatives' bill indicated no intention to preempt states and localities from regulating the use and operation of nonroad engines and vehicles.

> Section 209 of the Act is amended to provide that no State or political subdivision shall adopt or enforce standards relating to the control of emissions from new nonroad vehicles subject to regulation under this Act. This preemption does not apply to existing nonroad vehicles or engines.

H.R. Rep. No. 490, 101st. Cong. at 310 (1990).

Indeed, given that this language echoes the language of section 209(a), which clearly did not preempt use restrictions on existing motor vehicles,[24] [FN22] the language indicates no intent to preempt such use restrictions.

This intention is reasonable, given the locally based nature of use and operational restrictions. As the court in *EMA v. EPA* noted, "the EPA maintains that because in-use restrictions are inherently local in character, in that their appropriateness depends on local conditions, it would not make sense for Congress to require all states?? to follow California's lead on this issue. This, too, tends to support the reasonableness of the EPA's interpretation." 88 F.2d at 1094 n. 58.

Congress made this clear in 1967, with respect to motor vehicles. "Specific language indicating the committee's position on the rights of the States to control the movement, operation and use of licensed or registered vehicles is included. This language is of particular importance. While there has been a great deal of concern expressed regarding control of new vehicles little attention has been paid to control of used vehicles, either their emissions or their use...These are areas in which the State and local government can be most effective." S. Rep. No. 403, at 34.

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[24] Section 209(d), protecting the rights of states to regulate use and operation of motor vehicles, was added specifically to ensure that the language of section 209(a) was not interpreted to apply to use restrictions, which Congress understood to be best left to state and localities. *See* S. Rep. No. 403, 90th Cong. 1st Sess. at 34 (1967), quoted above at pp. 2-3.

As this language indicates, states and localities have traditionally not been preempted from regulating the use and operation of mobile sources. ARTBA produces no evidence that, for the vast majority of mobile sources, there is any history of preemption of such regulation. On the contrary, as CARB notes, local districts long regulated the use of nonroad engines, particularly portable engines. Indeed, with regard to motor vehicles, the Clean Air Act actually encourages EPA to provide information to help state and local entities regulate their use for the purpose of reducing emissions. *See* Clean Air Act section 108(f), 42 U.S.C. § 7408(f).

ARTBA's sole evidence of prior history of state and local preemption comes from the specific circumstances of locomotives, one of numerous categories of nonroad engines. There is little question that there is a long history of preemption of state regulation of locomotive engine design, construction and material, *see Napier v. Atlantic Coast Line*, 272 U.S. 605 (1926).[25] [FN23] EPA and Congress have indeed noted specific concerns regarding state and local regulation of locomotives and EPA has treated state and local regulation of locomotives as a special case. However, the fact that one category of nonroad engines, representing a very small percentage of the population of nonroad engines, has been traditionally protected from state and local regulation is no reason to impart such protection on the vast number of nonroad engines that have not traditionally been subject to such protection.

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[25] Though even with regard to locomotives, some commenters argue that there is no long history of preemption of state regulation of use and operation.

2. Statutory Language and Legislative History

*a. Definition of "new"*

ARTBA's arguments regarding the meaning of section 209(e) and section 213(d) are not convincing. First, ARTBA's argument relies on a definition of "new nonroad engine" that is at odds with the structure of title II of the Act and was rejected by EPA in its initial rule: a decision that was upheld by the court in *EMA v. EPA*, 88 F. 3d at 1084-1087.

When EPA defined the term "new nonroad engine" in its initial nonroad engine rule in 1994, EPA incorporated the statutory definition of "new motor vehicle" and "new motor vehicle engine" in section 216 of the Act, which is the "showroom new" that ARTBA now criticizes. EPA's definition was explicitly challenged in the *EMA v. EPA* case and was explicitly upheld. *Id.*

ARTBA does not explain its arguments as to why EPA's definition of "new" is contrary to the statute or unreasonable, or why its definition would make more sense in the context of Title II. ARTBA does mention that EPA used a different definition of "new" for locomotives, but does not explain why that difference, which is discussed elsewhere and is based on the specific circumstances of remanufactured locomotives, rendered EPA's reasoned definition of "new' for all other nonroad engines unreasonable.

ARTBA provides no argument that EPA's definition of "new" as it was promulgated for all other nonroad engines, based on the definition of "new motor vehicle," was unreasonable or that EPA's decision to include remanufactured locomotive engines as "new" engines until they are reintroduced into commerce, based on the particular

remanufacturing practices in the locomotive industry, was unreasonable. Nor is it unreasonable for EPA to take into account separate circumstances in defining "new" differently for locomotives than for other nonroad engines, especially considering that the term "new locomotive" is used distinctly from other new nonroad engines in both sections 209 and 213.

Indeed, it is ARTBA's proffered definition of "new" that would be inconsistent with the intent of the statute. As discussed below, section 213(d) of the Act incorporates the enforcement and compliance provisions of Title II into the standards for nonroad engines. These provisions were written initially in the context of standards on new motor vehicles and new motor vehicle engines, defined as "showroom new." The compliance and enforcement provisions are generally geared towards manufacturers, centering on manufacturer requirements to have their engines certified prior to introduction into commerce, tested at the assembly line, and subjected to warranty. Even the in-use testing and recall requirements are geared towards the manufacturer, not the user. Thus, the general compliance and enforcement regime in title II, which was statutorily expanded to apply to EPA's emission standards for nonroad engines, is geared towards ensuring compliance by manufacturers, generally at, or prior to, the point of sale. The few enforcement provisions geared towards users are not restricted to "new" engines or vehicles, and deal more with tampering with manufacturer controls, rather than requiring specific compliance actions by owners and operators. Thus, the definition of "new" in title II, which relates to introduction into commerce rather than the date

an engine was built, is consistent with the compliance provisions in title II.

ARTBA's proffered definition of "new," which is based on the definition of "new" in title I of the Act and makes all covered engines "new" from installation to disposal, is more suitable for a regime that focuses enforcement and compliance on the owner or operator of the engine, as title I does, not on the manufacturer. Thus, it is not suitable for the regime required by Congress for nonroad engines. In addition, section 213(a) incorporates the idea of leadtime into EPA's standard-setting. However, the definition of "new" proffered by ARTBA would define all engines installed after the rule is finalized to be considered new, which would require them to meet the standards. This would appear to be inconsistent with the idea of leadtime otherwise intended in section 213, because manufacturers would have no leadtime to meet standards applicable to engines manufactured directly following the promulgation of the rule.

Even with regard to the definition of "new" for locomotives and locomotive engines, ARTBA overstates the actual differences between the definition of "new locomotive" and the definition of "new nonroad engine." As with other nonroad engines, a locomotive that has been introduced into commerce, or reintroduced into commerce following remanufacture, is not a new locomotive. It is only during the period of remanufacture, when a locomotive is not in service, that a locomotive again becomes new. Thus, even this slight difference in definition, which as discussed elsewhere is necessitated by the peculiar circumstances for locomotives, still incorporates the general intention

of title II by holding the definition of new to the time or times when an engine is in not in actual service, during which time the engine is being manufactured or remanufactured.

ARTBA also implies that EPA's definition of new allows California to mandate retrofit requirements immediately after a nonroad engine ceases being new, which would nullify the preemption. This argument was raised and expressly rejected in *EMA v. EPA*.

The court referred to a previous decision regarding the ability of states to regulate motor vehicles directly after leaving the showroom, given the statutory definition of "new motor vehicle." In that case, *Allway Taxi v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd*, 468 F. 2d 624 (2d Cir. 1972), the court found that states could not regulate new motor vehicles as soon as they left the showroom, despite the explicit definition of new motor vehicle that limited preemption to showroom-new motor vehicles. Rather, state emission controls must be sufficiently delayed after original sale to avoid burdening the manufacturer.[26] [FN24] *See* the discussion in *EMA v. EPA*, 88 F. 3d at 1083.

As the court in *EMA v. EPA* noted:

> The EPA correctly responds that if [Petitioners' arguments] were so, then the statutory definition of 'new motor vehicle'

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[26] "We do not say that a state or locality is free to impose its own emission control standards the moment after a new car is bought and registered. That would be an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce." *Allway Taxi*, 340 F. Supp. at 1124.

> would render § 209(a) a 'nullity'. Not only has this not happened – the preemption scheme for motor vehicles has been working for almost thirty years – but the statute cannot be said to speak ... against the EPA's definition, when Congress, operating under almost identical statutory language in the motor vehicle preemption regime, expressly used a virtually identical definition of 'new.' The *Allway Taxi* interpretation, postponing state regulation so that the burden of compliance will not fall on the manufacturer, has prevented the definition of 'new motor vehicle' from nullifying the motor vehicle preemption regime. [Petitioners have] offered no reason to suspect an essentially identical definition of 'new nonroad engine' will nullify the nonroad preemption scheme either.

*EMA v. EPA*, 88 F. 3d at 1086.

To the extent ARTBA is stating that EPA's definition of "new" allows California to mandate a retrofit immediately after the engine is no longer new, section 209(e)(2) clearly allows California to regulate certain categories of nonroad engines, both new and used, pursuant to EPA authorization. The ability of California to regulate those engines not covered under section 209(e)(1) pursuant to EPA authorization is explicit in the statute and is not dependent on any definition of "new." For those engines that are covered by section 209(e)(1), the *Allway Taxi* restrictions, endorsed by EPA and the

court in *EMA v. EPA*, would prevent such immediate retrofits.[27] [FN25]

Thus, ARTBA's argument regarding the meaning of sections 209(e) and 213(d) are faulty at the outset as they rely on an inappropriate definition of "new." As the next section shows, there are other serious problems with ARTBA's interpretation.[28] [FN26]

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[27] ARTBA makes a curious argument that section 209(c), which was added in 1977, overturned *Allway Taxi*. This little-used provision prevents states from requiring certification or approval for any aspect of a part that has been subject to the voluntary certification provisions in section 207(a)(2). "This section provides that if a Federal part certification program is established under [section 207(a)(2)], then any part certified under the Federal program would not have to be recertified under any State or local program." H. Rep. No. 94-1175, at 18. The regulations implementing the section 207(a)(2) certification program are located at 40 CFR 85.2112-2122. This provision has never, in any legislative history or any subsequent case or EPA determination, been found to have any effect on *Allway Taxi*. Indeed, *Allway Taxi* is cited favorably in *EMA v. EPA*. The *Allway Taxi* case dealt with regulations on vehicles, particularly directly towards owners or operators, not on particular parts or aspects of parts. In any case, this issue is of little concern here because ARTBA's concerns deals with restrictions on use, which would not affect parts, or refer to the "aspect" of any parts, but only the use of the vehicle.

[28] ARTBA's interpretation also has the problem of not explaining whether "new" engines, state regulation of which is claimed to be wholly preempted from birth to death, but which are not regulated by EPA, or are only regulated with respect to particular pollutants, can be regulated at all by any party. EPA was not required to promulgate standards for two years after promulgation of the Act, and was required also to account for appropriate leadtime. Moreover, EPA could not promulgate standards for NOx, VOCs and CO unless it made the appropriate findings in section 213(a)(2). Finally, EPA regulation of other pollutant emissions from nonroad engines is discretionary under section 213(a)(4). Thus, for several reasons,

*b. Section 213(d)*

Section 213(d) states, in part, that the EPA nonroad standards promulgated under section 213(a) "shall be subject to sections 206, 207, 208 and 209." EPA has interpreted this language as extending the preemption provisions of section 209 to state and local regulation of nonroad engines, including section 209(d), which clarifies that state and local regulation of the use and operation of motor vehicles is not preempted. In *EMA v. EPA*, 88 F. 3d at 1093-94, the Court noted that neither EPA's explanation nor petitioners' explanation of section 213(d), which appears to incorporate section 209's restrictions on state motor vehicle standards into a provision authorizing federal standards for nonroad engines, was "entirely satisfactory." *Id.* at 1094. The court, however, deferred to EPA's reasonable interpretation of an ambiguous statute.

ARTBA posits the argument that section 213(d) "merely created a one-to-one correspondence between the nonroad vehicles to which Clean Air Act preemption applied and those for which the Clean Air Act required EPA to issue standards." According to ARTBA, section 213(d) simply linked the new vehicles "subject to regulation under this Act" to section 209(e)'s preemption.

ARTBA's position contains the same problem that all other interpretations have had: it does not

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numerous nonroad engines manufactured after the promulgation of the Clean Air Act Amendments would or could not be regulated, or potentially regulated only for specified pollutants. Thus, the one-to-one correspondence ARTBA refers to would not occur. Moreover, this one-to-one correspondence clearly does not occur under the provisions of the final statute.

explain how federal standards could be "subject to" a provision (section 209) that restricts the ability of states to promulgate standards. Subjecting federal standards to section 209 does not in any way effect state ability to regulate the engines subject to those standards, and conversely, saying that states are preempted from promulgating certain standards does nothing to affect the promulgation of federal standards. Thus, the language in section 213(d) will in any case need to be given meaning through interpretation that can never be "entirely satisfactory," given the inartfulness of the original language.

ARTBA, noting that the language in section 213(d) was added in the House of Representatives, relies on the language in the House Committee report for its position:

> Standards issued under this subsection [213] are to be subject to sections 206, 207, 208, and 209... Section 209 of the Act is amended to provide that no State or political subdivision shall adopt or enforce standards relating to the control of emissions from new nonroad vehicles subject to regulation under this Act. This preemption does not apply to existing nonroad vehicles or engines.

H.R. Rep. No. 490, 101st. Cong. at 310 (1990).

Yet it is not clear how this language helps ARTBA's position. First, as the language of section 209(e) was changed substantially in conference, any legislative history describing the effect of the House bill on state preemption is of questionable use in determining the effect of the final Clean Air Act Amendments on state preemption.

However, given the fact that the statutory language of section 213(d) did not change from the House bill to the final bill, it is still useful to review the legislative history for the House bill to determine the intention of the House in crafting that language. The Committee report clearly indicates an intention not to preempt state and local regulation of existing nonroad engines; thus meaning that restrictions on the use of such engines would not be preempted. Moreover, the juxtaposition of section 209 with sections 206, 207, and 208, provisions clearly written to apply to new motor vehicles, using the statutory definition of new that EPA relies on, indicates Congress's intent for EPA to regulate nonroad engines using the same structural mechanisms as are used for motor vehicles. Thus, even if this language indicates those engines that are regulated by EPA are preempted from regulation by states, given EPA's reasonable definition of "new," this still means that state and local regulation of non-new nonroad engines (i.e. engines in use) would not have been preempted.

Moreover, ARTBA's apparent view that the reference to section 209 in section 213(d) is only a reference to section 209(e) is not satisfactory. First, if Congress wished to restrict the applicability to only section 209(e), then it could have done so explicitly. ARTBA argues that the rest of section 209, including 209(d), does not refer to nonroad engines. However, sections 206, 207, and 208 are similarly written only to apply to motor vehicles, because like section 209(a) through (d), they were written prior to the incorporation of nonroad engines into Title II. Similarly, sections 203 through 205, the enforcement provisions, of Title II, which are implicitly referenced

in section 213(d)'s requirement that nonroad engine standards promulgated under section 213(a) be "enforced in the same manner as standards prescribed under section 202," are written only to apply to motor vehicles. The entire purpose of subsection 213(d) is to, in shorthand fashion, extend to nonroad engines all of the basic non-standard-setting provisions of Title II that are on their face applicable only to motor vehicles. Indeed, if those sections of Title II did refer explicitly to standards regulating nonroad engines, section 213(d) would be superfluous. Thus, the fact that section 213(d) incorporates by reference all of section 209 indicates that the House of Representatives intended the reference to apply to all of section 209, not just 209(e).

Indeed, the language revising section 209 that was included in the House of Representatives' bill contemporaneously with section 213(d) stated:

> (e) No state or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from new nonroad engines or nonroad vehicles subject to regulation under this Act. Subsection (b) shall not apply for purposes of this subsection.

That fact that the House of Representatives explicitly excluded subsection (b) from subsection (e) indicates that it believed failure to do so would have meant that the waiver provisions in subsection (b) would otherwise be applicable to California standards and other requirements related to the control of emissions from new nonroad engines. It

also indicates that the House of Representatives did intend the remaining sections of section 209 to apply to state regulation of nonroad engines.

ARTBA also argues that since section 213(d) applies only to EPA's new vehicle standards under section 213(a), section 209(d) could only save states' authority to impose use restrictions on nonroad engines until they leave the showroom floor, which is illogical. But this analysis is a strawman, as EPA has always maintained that the purpose of section 213(d)'s reference to section 209 was to import section 209's restrictions on state standards (and, conversely, the explicit saving of state and local use restrictions) to all nonroad engines, not merely new nonroad engines, in the same manner as for motor vehicles. Indeed, even taking ARTBA's preferred definition of "new," the savings provision in section 209(d) would act to save state regulation of the use of such "new" nonroad engines, because section 209(d) does not distinguish between use restrictions on new and other engines.

EPA continues to interpret Congress's intent in referring to section 209 in section 213(d) as, however inartfully, extending section 209's restrictions on state and local standards regulating motor vehicle emissions to state and local standards regulating emissions from nonroad engines.

*c. Section 209(e)*

ARTBA makes the argument that section 209(e) is unambiguous in prohibiting states and localities from regulating the use and operation of nonroad engines. Yet this view is at odds with the view of both EPA and the court in *EMA v. EPA*, *see*, 88 F. 3d

at 1093-94.[29] [FN27] The term "requirements" in section 209(e) is not a defined term and is ambiguous, particularly when placed in the context of the remainder of section 209 and the language in section 213(d). The word "requirements" has had a specific meaning in the context of section 209. In sections 209(a) and (c) the term requirements refers to certification, inspections and other approvals, but not to restrictions on use.[30] [FN28]

As discussed above, Congress explicitly intended to extend much of its regulatory apparatus for motor vehicles to nonroad engines, and referenced section 209 directly in section 213(d)'s extension of motor vehicle provisions to nonroad engines. Section 209(e)(2)'s language in many respects echoes the language in subsections 209(a) and (b) and section 177. This indicates that Congress intended to reference the same types of requirements in section 209(e) as it did in sections 209(a) and (c).

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[29] ARTBA notes the opinion of the court in *EMA v. Huston*, 190 F. Supp 2d 922 (W.D. Tex. 2001), *vacated as moot*, No. 01-50819 (5th Cir. Mar. 5, 2002), finding that certain restrictions (including a restriction on use of construction equipment during certain times of the day) were preempted under section 209(e) and rejecting EPA's interpretation, and EPA's own rejection of the *Huston* decision as an inappropriate collateral attack on our regulations and the decision of the court in *EMA v. EPA*. 60 Fed. Reg. 57, 223, 2425 (Nov. 14, 2001). The decision of the court in that case, to which EPA was not a party, provides a summary analysis, without addressing the numerous issues of statutory interpretation and legislative history analyzed by EPA and the Court of Appeals in *EMA v. EPA*. The opinion is not persuasive. In addition, the decision has since been vacated as moot by the Court of Appeals for the 5th Circuit.

[30] Sections 209(a) and (c) refer to "certification, inspection or ... approval" relating to the control of emissions.

Moreover, there are indications in subsection 209(e) that Congress intended the reference to other requirements to apply only to accompanying enforcement procedures and compliance provisions. For example, in section 209(e)(2)(B), the reference to "other requirements" occurs only once. The California authorization provision states that EPA may authorize California to adopt and enforce standards and other requirements if California determines that the standards will be, in the aggregate, at least as protective, and if EPA does not make three findings. Two of the three findings refer only to California's standards and the third refers to "California standards and accompanying enforcement procedures." Thus, to the extent "other requirements" include substantive provisions (like use restrictions) beyond the compliance and enforcement provisions referenced in subsections 209(a) and (b), the formula for granting authorization completely ignores any examination of these provisions, because EPA's examination looks only at standards and accompanying enforcement procedures in granting authorizations. It seems absurd that an implied preemption provision could allow for authorization of provisions without any review of such provisions.

Section 209(b)(2)(B), the provision that allows other states to promulgate standards for nonroad engines if they are identical to California standards similarly equates "standards and other requirements" (actually referred to as "other actions as are referred to in subparagraph (A)") with "standards and implementation and enforcement." Again, to the extent "other requirements" are a subset larger than "implementation and

enforcement," section 209(b)(2)(B) would allow other states to implement any such requirements as long as any standards they happen to implement at the same time are identical to California's. In essence, this effectively eliminates any preemption on state and local use restrictions, because none of the conditions needed to be met by states to overcome such preemption even apply to use restrictions.[31] [32] [FN 29, 30]

Aside from the statutory interpretation problems created by ARTBA's interpretation, ARTBA's interpretation is contrary to the entire history of the Clean Air Act and is not supported by the legislative history. On the contrary, the only legislative history on the issue of whether states can continue to regulate use of nonroad engines in general squarely indicates that such state authority remains.[33] [FN31]

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[31] Also, as discussed above, the proposed House of Representative's language that first introduced the "standards and other requirements" language also contained language indicating that the provisions of subsection (b), but not subsections (c) and (d), were inapplicable to the preemption of state and local standards for new nonroad engines. This indicates that the use of "other requirements" was coextensive with the intention to allow states and localities to regulate use and operation.

[32] ARTBA notes that the language of the Bond amendment (Pub.L. 108-199, section 428) tracks the "standards or other requirements" language of section 209(b)(2)(A), not "standards and implementation and enforcement" language of section 209(b)(2)(B), but this does not resolve the issue of what regulations Congress was referring to when it referred to "standards or other requirements."

[33] *See* Statement of Sen. Baucus, styled as a Clean Air Conference Report ("States also fully retain existing authority to regulate emissions from all types of existing or in-use nonroad engines or vehicles by specifying fuel quality

These contemporaneous floor statements from leading Senate negotiators indicates their view that the final legislation did not preempt state and local authority to regulate use, which directly contradicts ARTBA's view. Moreover, this legislative history comports with the explicit view of Congress when it passed the original state preemption language in 1967.

> Specific language indicating the committee's position on the rights of the States to control the movement, operation and use of licensed or registered vehicles is included. This language is of particular importance. While there has been a great deal of concern expressed regarding control of new vehicles little attention has been paid to control of used vehicles, either their emissions or their use...These are areas in which the State and local government can be most effective."

S. Rep. No. 403, at 34.

Moreover, section 108(f) of the Clean Air Act actually encourages such state and local regulation, at least with regard to motor vehicles and requires EPA to provide assistance for such regulation. Indeed, state and local regulation of the use of emission sources, both stationary and mobile, is commonplace. ARTBA has provided no particular policy reason for nonroad engines as a whole to be treated differently from other

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specifications, operational modes or characteristics or measures that limit the use of nonroad engines or equipment.") 136 Cong. Rec. S16976 (October 27, 1990) and Statement of Sen. Chafee ("States can continue to require existing and in-use nonroad engines to reduce emissions by setting fuel requirements, operational restrictions or limits on the use of such equipment.") 136 Cong. Rec. S17237 (October 26, 1990).

sources of pollution with regard to the ability of states and localities to regulate their use. In addition, as the comments of CARB indicate, localities have in the past often promulgated restrictions on the use of nonroad engines and vehicles. Thus, there is no history of preemption of state regulation of use of nonroad engines.

The interpretation that states and localities should not be preempted from regulating use and operation of nonroad engines also is reasonable on policy grounds. Unlike regulations that affect the design of an engine, use restrictions that differ from place to place do not threaten the national uniformity needed by manufacturers because use restrictions do not restrict the design of the engine. For the same reason, operators can meet different use restrictions in different states without needing engines meeting different design requirements in the different states. Moreover, as noted by the *EMA v. EPA* court, and the 1967 legislative record, states and localities are best able to regulate the use and operation of these engines. Use restrictions, unlike restrictions on engine design, often are tied directly or indirectly to particular conditions or characteristics of a local area (e.g. particular locations, density of population, type of engines used in a particular area), and are best designed by the local regulatory body. Use restrictions that are sensible in one location may be impossible in another. Thus, regulation of the use of nonroad engines may be ill-suited for one size fits all national regulation, including regulation by the state of California that becomes the only possible regulations available for other states and localities under section 209(e)(2). This is in contrast to regulations directed to the design of nonroad engines, because the engine designs are not differentiated from locality to locality.

EPA should be cautious in ascribing any intent by Congress to create such a new preemption. *See Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("the historic powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."). This is especially true considering that since EPA initially made its interpretation regarding use restrictions in 1994 and the *EMA v EPA* court upheld this interpretation in 1996, Congress has made no attempt to reverse this interpretation.

Given the ambiguous statutory language (particularly when read in the context of section 213(d)) and the legislative history indicating Congress did not intend to preempt use restrictions, as well as the policy grounds for leaving such restrictions in the hands of individual states and localities, EPA does not believe it is appropriate to revise its interpretation that state and local restrictions on the use of nonroad engines and vehicles is not preempted.

3. Locomotive Provisions

ARTBA claims that EPA's actions in the 1998 locomotive rule indicate that EPA should now preempt state and local restrictions on use for all nonroad engines. In that rule, EPA promulgated a slightly different definition of "new" for the purposes of regulating locomotives, compared to the definition for other nonroad engines. EPA also explicitly stated that particular types of state and local standards regulating locomotives and locomotive engines were preempted under section 209(e)(1). For the following reasons, EPA believes that EPA's actions in that rule do not affect EPA's interpretation regarding preemption of state and local regulations on the use of nonroad engines.

As discussed in detail in the 1998 rule and the notice of proposed rulemaking for that rule 62 Fed.

Reg. 6365 (February 11, 1997),[34] [FN32] the difference in the definition of new locomotive, compared to other new nonroad engines, is based in particular on the differences in the way locomotives are used and remanufactured, compared to other nonroad engines. Locomotive engines are kept in service for very long periods of time, compared to most other nonroad engines, and, in order to keep them in service for these long periods, are extensively remanufactured in a manner such that engines that have been remanufactured should be considered new again. EPA believed then and now that this particular aspect of locomotive use and remanufacture was sufficiently different from other nonroad engines, as well as motor vehicle engines, that a slight expansion of the definition of "new" was appropriate for these engines – otherwise, the vast majority of locomotives, particularly those in the Class 1 railroad fleet, could avoid federal regulations for many years, despite being subject to a remanufacturing process that extensively renovated those engines.

Moreover, EPA circumscribed the definition of "new locomotive engine" to apply only to engines during the period prior to introduction of the engine into commerce after of manufacture or after remanufacture. While this change in definition includes the period during which remanufacture occurs as being part of the period when the engine is new, the definition still excludes engines once they have been reintroduced into commerce, which is consistent with the definition of new nonroad engine for all other engines.

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[34] See also the Summary and Analysis of Comments on the Notice of Proposed Rulemaking for Emission Standards for Locomotives and Locomotive Engines, Document No. A-94-31, V-C-1 (December 16, 1997).

The 1998 rule also made more explicit certain aspects of preemption with regard to regulation of locomotives and locomotive engines. EPA stated that it was providing more specific information because of the special circumstances regarding regulation of locomotives, because state and local standards that relate to control of emissions on new locomotives are subject to more encompassing preemption than other state and local standards regulating locomotives. The different definition of "new" affecting locomotives was relevant to this issue. EPA also mentioned the following issues: the interstate nature of locomotive travel and the fact that regulation of locomotives has generally been national in scope; the nature of the relationship between locomotive manufacturers and class I railroads (which are generally the only buyers of freshly manufactured locomotives, and thus have a large input in the design of locomotives); historic preemption of state regulation of locomotive design and concern that different state and local standards could have affect on daily activities of railroads.

However, even with regard to state and local control of locomotives, the state and local provisions EPA specifically listed as preempted were provisions "that would be expected to affect how a manufacturer designs a new locomotive or new locomotive engine (including both freshly manufactured and remanufactured units)." 62 Fed. Reg. at 6396-97, citing *Allway Taxi v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd* 468 F.2d 624 (2d. Cir. 1972). Consistent with the Allway Taxi case, EPA determined that certain standards on in-use locomotives (which no longer meet the definition of new locomotives) should be preempted under section 209(e)(1). The expected impact of these standards on the design of new locomotives was such that they should be treated as

standards "relating to the control of emissions from ... new locomotives or new engines used in locomotives," even though the standards themselves applied to in-use locomotives that were no longer new.

EPA did not include use restrictions in that list, which defined certain "standards and other requirements" that were preempted, and was silent on that issue in the 1998 rule, so there is particularly little precedential value of the 1998 rule regarding preemption of use restrictions for other nonroad engines. We do note, however, that with regard to state and local restrictions on the use of locomotives, other statutes that apply specifically to locomotives, like the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101, *et seq.*, may create preemption of state and local regulation of locomotives beyond that of the Clean Air Act, *see Association of American Railroads v. South Coast Air Quality Management District*, No. CV-06-01416, 2007 U.S. Dist. LEXIS 65685 (C.D. Cal., Apr. 30, 2007).

It is clear that locomotives represent a clear and distinct category of nonroad engine that has historically been treated as more appropriately regulated at a national level than a local level. *See Napier v. Atlantic Coast Line*, 272 U.S. 605 (1926). It is also clear that Congress, both explicitly in the statute and in the legislative history, indicated its preference for national regulation of locomotives. Locomotives are the only category of nonroad engine that EPA must regulate without any prior examination of contribution to nonattainment, under section 213(a)(5). In addition, new locomotives and new locomotive engines are one of only two categories of new nonroad engines for which state and local standards are prohibited with no ability for California to receive EPA authorization to regulate. With regard to that provision, the legislative history

indicates Congress was particularly concerned regarding state and local regulation of locomotives.

> States are preempted from regulating only two categories of new nonroad vehicles and engines – first, small farm and construction equipment, and second, new locomotives and new engines used in locomotives. With regard to this latter category, we balanced the need to control emissions from new locomotives against our belief that State efforts to regulate locomotive emissions or operations would impose an unconstitutional burden on interstate commerce. As a result, we require EPA to regulate new locomotive emissions within 5 years, without first subjecting such emissions to the study [in section 213(a)(1)].

136 Cong. Rec. H12848 (October 26, 1990).

As we noted in the NPRM for the locomotive rule, "[t]he legislative history of section 209(e) does not contain a similar statement regarding any other category of nonroad vehicles, indicating Congress' specific concern with the interstate commerce burden that could result from state regulation of new locomotives." 62 Fed. Reg. 6397-98.

Locomotives represent only one category, relatively small in number and distinct in many ways, of nonroad engines. Specific statutory provisions, and special circumstances for locomotives, which have been recognized by numerous different parties, led to EPA providing somewhat different rules regarding state and local regulation of these engines. However, the circumstances that led to such actions with regard to locomotives have not been shown with regard to other nonroad engines. The particularly interstate nature of

locomotive activity is not replicated by the activity of other nonroad engines in general or the vast majority of nonroad engines; there is no history of preemption of state and local regulation of other nonroad engines, indeed commenters note that such regulation has occurred; and the legislative history does not indicate Congress was as concerned regarding state and local regulation of other nonroad engines compared to such regulation relating to new locomotives. ARTBA provides no evidence nonroad engines as a whole are subject to these arguments in the manner that locomotives are. The special actions taken with regard to locomotives therefore provide no reason to change the interpretations for other nonroad engines, which represent the vast majority of such engines.

c. Related Issues

1. Separate Rulemaking

*i. Comments*

Several commenters believe that EPA should have reviewed ARTBA's petition, or should make any revisions to regulations based on ARTBA's petition, in a separate rulemaking. ARTBA states that state preemption could lead to significant consequences for the transportation community. State preemption should be thoroughly discussed on its own, rather than as part of a larger proposal that may overshadow this critical point. NESCAUM similarly states that ARTBA's petition is not relevant to the proposed rule and EPA should not respond to ARTBA's petition in this rulemaking. EMD suggests that it increases the regulatory burden on manufacturers to have measures that are only peripherally related in broader rules because the manufacturers have to review rules that on first glance do not apply to them to make sure such peripherally related measures, which may apply to them, are or are not included.

GE states that because EPA did not propose any substantive changes to the preexisting approach to preemption regarding standards for locomotive engines, any substantive change to that approach would have to be through notice and comment. NACAA recommends that if EPA makes even modest changes to the preemption regulations in response to ARTBA's petition, such changes be the subject of a separate notice and comment rulemaking. NESCAUM states that any changes to regulations contemplated in response to ARTBA's comments should be subject to a separate rulemaking process.

ii. *Discussion*

Regarding the request to address ARTBA's petition in a stand-alone rule, EPA believes that addressing the issue of preemption in this rule, where several other issues related to preemption were being addressed, was the best use of the Agency's limited resources to address the petition. EPA believes that this rulemaking process provided a thorough discussion of the issues in ARTBA's petition, and EPA does not believe that the petition would have been more thoroughly discussed in any other context. EPA also believes that ARTBA's petition was not overlooked in the larger package and, indeed, EPA received over one dozen comments addressing the petition. The comments came from various industry representatives (from the locomotive and railroad, small engine, and road and transportation industries), from representatives of states and local interests, and from environmental interests. EPA believes that including ARTBA's petition as part of a larger package may even have increased the number of potential commenters.

Regarding the comments that EPA would have to engage in a separate rulemaking to make any substantial changes to the preemption provisions,

rather than making them directly in the final rule, EPA made no substantial changes to the provisions regarding preemption in the final rule, and none as a result of our review of the ARTBA petition, compared to the proposal.

2. Codifying the Interpretive Rule and Moving It to Part 1074

*i. Comments*

CARB and NRDC request that since U.S. EPA is addressing state preemption under section 209(e), it should take this opportunity to codify its interpretive rule presently found at "Appendix A to subpart A of 40 CFR part 89." CARB states that Appendix A, which exclusively addresses state preemption, including the finding that in-use operational controls do not fall within the scope of preemption, would be more appropriately placed in new part 1074. This codification would ensure that other courts grant greater deference to U.S. EPA's position and the EMA Court's judgment. Finally, codifying Appendix A in part 1074 would make practical sense in that part 1074 will be the part of 40 CFR where U.S. EPA's regulations on state preemption of nonroad engines are located. It does not make sense for a practitioner to read part 1074, without knowing U.S. EPA's position that in-use operational controls do not fall within the scope of preemption.

*ii. Discussion*

EPA agrees in concept with CARB and NRDC's statement that in the long term Appendix A should be codified as a legislative rule and moved from Part 89, which part will eventually be phased out. However, EPA did not proposed to make these changes and the comments above regarding changing the preemption regulations from what was proposed indicate that

several other commenters believe that any such change, even one that does not substantively change EPA's provisions, should be handled in a separate rulemaking. EPA will keep in mind CARB's suggestion for possible future action.

* * *

**73 FR 59,034 (Oct. 8, 2008)**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 9, 60, 80, 85, 86, 89, 90, 91, 92, 94, 1027, 1033, 1039, 1042, 1045, 1048, 1051, 1054, 1060, 1065, 1068, and 1074**

**[EPA-HQ-OAR-2004-0008; FRL-8712-8]**

**RIN 2060-AM34**

**Control of Emissions From Nonroad Spark-Ignition Engines and Equipment**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

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Section VIII describes a variety of provisions that affect other categories of engines besides those that are the primary subject of this rule. This includes the following changes:

• We are reorganizing the regulatory language related to preemption of state standards and to clarify certain provisions.

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## VIII. Requirements Affecting Other Engine and Vehicle Categories

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### *A. State Preemption*

Section 209(e) of the Clean Air Act prohibits states and their political subdivisions from adopting or enforcing standards and other requirements relating to the control of emissions from nonroad engines or vehicles. Section 209(e) authorizes EPA to waive this preemption for California for standards and other requirements for nonroad engines and vehicles, excluding new engines that are smaller

than 175 horsepower used in farm or construction equipment or vehicles and new locomotives or new engines used in locomotives. States other than California may adopt and enforce standards identical to California standards authorized by EPA.

EPA promulgated regulations implementing section 209(e) on July 20, 1994 (59 FR 36987). EPA subsequently promulgated revised regulations implementing section 209(e) on December 30, 1997 (62 FR 67733). See 40 CFR part 85, subpart Q. As proposed, we are creating a new part 1074 that describes the federal preemption of state and local emission requirements. This is being done as part of EPA's ongoing effort to write its regulations in plain language format in subchapter U of title 40 of the CFR. The final regulations are based directly on the existing regulations in 40 CFR part 85, subpart Q. With the exception of the specific changes described in this section, we are not changing the meaning of these regulations.

Pursuant to section 428 of the 2004 Consolidated Appropriations Act, we are adding regulatory language to implement the legislative restriction on states other than California adopting, after September 1, 2003, standards or other requirements applicable to spark-ignition engines smaller than 50 horsepower. We are also adding, pursuant to that legislation, criteria for EPA's consideration in authorizing California to adopt and enforce standards applicable to such engines.[120]

In addition, on July 12, 2002, the American Road and Transportation Builders Association (ARTBA) petitioned EPA to amend EPA's rules implementing

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[120] See section 428 of the Appropriations Act for 2004.

section 209(e) of the Act.[121] In particular, ARTBA petitioned EPA to amend its regulations and interpretive rule regarding preemption of state and local requirements "that impose in-use and operational controls or fleet-wide purchase, sale or use standards on nonroad engines."[122] ARTBA believes such controls should be preempted.

As we were already planning to revise the preemption provisions to a certain extent in this rule, we determined that it was appropriate to respond to ARTBA's petition in the context of this rule, and noticed our review in the proposal for this rule, giving the public the ability to respond to provide comments regarding ARTBA's petition. After reviewing ARTBA's petition and the comments received regarding the petition, EPA is not adopting the changes requested by ARTBA in its petition. While EPA is in agreement with ARTBA regarding some of the observations it makes in the petition regarding preemption of state standards, particularly state fleet average standards, we believe

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[121] "Petition to Amend Rules Implementing Clean Air Act section 209(e)," American Road and Transportation Builders Association (ARTBA), July 12, 2002. Also, EPA received an additional communication from ARTBA urging EPA to grant the petition after the decision of the U.S. Supreme Court in EMA v. SCAQMD, 541 U.S. 246 (2004). See "ARTBA Petition," L. Joseph, ARTBA, to D. Dickinson & R. Doyle, EPA, April 30, 2004. These documents are available in Docket EPA-HQ-OAR-2004-0008.

[122] In 1994, EPA promulgated an interpretive rule at Appendix A to subpart A of 40 CFR part 89. This interpretive rule was amended as part of the rule promulgated on December 30, 1997 (62 FR 67733). The appendix provides, among other things, that state restrictions on the use and operation of nonroad engines are not preempted under section 209.

the current regulatory language is sufficient regarding preemption of such standards. In addition, we believe that it would be inappropriate to grant ARTBA's request that we amend the existing regulations to find that restrictions on the use and operation of nonroad engines are preempted under section 209(e) of the Act. For a full discussion and response to ARTBA's petition and the comments we received on the petition, please review "Response to the Petition of American Road and Transportation Builders Association to Amend Regulations Regarding the Preemption of State Standards Regulating Emissions from Nonroad Engines," which has been placed in the docket for this rulemaking.

**Administrative Procedure Act , §4(e), 5 U.S.C. §553(e)**

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

**All Writs Act, 28 U.S.C. §1651(a)**

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

**Clean Air Act §110(a)(2)(E)(i), 42 U.S.C. §7410(a)(2)(E)(i)**

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

* * *

(e) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof)[.]

**Clean Air Act §209, 42 U.S.C. §7543**

(a) Prohibition

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that--

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be

at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

(c) Certification of vehicle parts or engine parts

Whenever a regulation with respect to any motor vehicle part or motor vehicle engine part is in effect under section 7541(a)(2) of this title, no State or political subdivision thereof shall adopt or attempt to enforce any standard or any requirement of certification, inspection, or approval which relates to motor vehicle emissions and is applicable to the same aspect of such part. The preceding sentence shall not apply in the case of a State with respect to which a waiver is in effect under subsection (b) of this section.

(d) Control, regulation, or restrictions on registered or licensed motor vehicles

Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

(e) Nonroad engines or vehicles

(1) Prohibition on certain State standards

No State or any political subdivision thereof shall adopt or attempt to enforce any standard or

other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this chapter--

(A) New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower.

(B) New locomotives or new engines used in locomotives.

Subsection (b) of this section shall not apply for purposes of this paragraph.

(2) Other nonroad engines or vehicles

(A) In the case of any nonroad vehicles or engines other than those referred to in subparagraph (A) or (B) of paragraph (1), the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that--

(i) the determination of California is arbitrary and capricious,

(ii) California does not need such California standards to meet compelling and extraordinary conditions, or

(iii) California standards and accompanying enforcement procedures are not consistent with this section.

(B) Any State other than California which has plan provisions approved under part D of subchapter I of this chapter may adopt and enforce, after notice to the Administrator, for any period, standards relating to control of emissions from nonroad vehicles or engines (other than those referred to in subparagraph (A) or (B) of paragraph (1)) and take such other actions as are referred to in subparagraph (A) of this paragraph respecting such vehicles or engines if--

(i) such standards and implementation and enforcement are identical, for the period concerned, to the California standards authorized by the Administrator under subparagraph (A), and

(ii) California and such State adopt such standards at least 2 years before commencement of the period for which the standards take effect.

The Administrator shall issue regulations to implement this subsection.

**Clean Air Act §307(b), 42 U.S.C. §7607(b)**

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or

prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such

petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

**Pub. L. No. 108-199, §428, 118 Stat. 3, 418-19 (2004) ("Bond Amendment")**

SEC. 428. REGULATION OF SMALL ENGINES. (a) In considering any request from California to authorize the State to adopt or enforce standards of other requirements relating to the control of emissions from new non-road spark-ignition engines smaller than 50 horsepower, the Administrator shall give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

(b) Not later than December 1, 2004, the Administrator of the Environmental Protection

Agency shall propose regulations under the Clean Air Act that shall contain standards to reduce emissions from new nonroad spark-ignition engines smaller than 50 horsepower. Not later than December 31, 2005, the Administrator shall publish in the Federal Register final regulations containing such standards.

(c) No State or any political subdivision thereof may adopt or attempt to enforce any standard or other requirement applicable to spark ignition engines smaller than 50 horsepower.

(d) EXCEPTION FOR CALIFORNIA.--The prohibition in subsection (e) does not apply to or restrict in any way the authority granted to California under section 209(e) of the Clean Air Act (42 U.S.C. 7543(e)).

(e) EXCEPTION FOR OTHER STATES.--The prohibition in subsection (c) does not apply to or restrict the authority of any State under section 209(e)(2)(B) of the Clean Air Act (42 U.S.C. 7543(e)(2)(B)) to enforce standards or other requirements that were adopted by that State before September 1, 2003.

**40 C.F.R. §85.1602 (1995)**

As used in this subpart, all terms not defined shall have the meaning given them in the Clean Air Act, as amended.

* * *

New engine used in a locomotive means new locomotive engine, as defined in 40 CFR 92.2.

New locomotive. The definition of new locomotive specified in 40 CFR 92.2 applies to this subpart.

New means a domestic or imported nonroad vehicle or nonroad engine the equitable or legal title to which has never been transferred to an ultimate purchaser. Where the equitable or legal title to an engine or vehicle is not transferred to an ultimate purchaser until after the engine or vehicle is placed into service, then the engine or vehicle will no longer be new after it is placed into service. A nonroad engine or vehicle is placed into service when it is used for its functional purposes. The term ultimate purchaser means, with respect to any new nonroad vehicle or new nonroad engine, the first person who in good faith purchases such new nonroad vehicle or new nonroad engine for purposes other than resale. This definition of new shall not apply to locomotives or engines used in locomotives.

* * *

**40 C.F.R. §85.1603 (1995)**

(a) For equipment that is used in applications in addition to farming or construction activities, if the equipment is primarily used as farm and/or construction equipment or vehicles, as defined in this subpart, it is considered farm or construction equipment or vehicles.

(b) States and any political subdivisions thereof are preempted from adopting or enforcing standards or other requirements from new engines smaller than 175 horsepower, that are primarily used in farm or construction equipment or vehicles, as defined in this subpart.

(c)(1) States and any political subdivisions thereof are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new locomotives and new engines used in locomotives.

(2) During a period equivalent in length to 133 percent of the useful life, expressed as MW-hrs (or miles where applicable), beginning at the point at which the locomotive or engine becomes new, those standards or other requirements which are preempted include, but are not limited to, the following: emission standards, mandatory fleet average standards, certification requirements, aftermarket equipment requirements, and nonfederal in-use testing requirements. The standards and other requirements specified in the preceding sentence are preempted whether applicable to new or other locomotives or locomotive engines.

(d) No state or any political subdivisions thereof shall enforce any standards or other requirements relating to the control of emissions from nonroad engines or vehicles except as provided for in this subpart.

**40 C.F.R. §92.2 (1995)**

(a) The definitions of this section apply to this subpart. They also apply to all subparts of this part, except where noted otherwise.

(b) As used in this part, all terms not defined in this section shall have the meaning given them in the Act:

* * *

New locomotive or new locomotive engine means:

(1)(i) A locomotive or locomotive engine the equitable or legal title to which has never been transferred to an ultimate purchaser; or

(ii) A locomotive or locomotive engine which has been remanufactured, but has not been placed back into service.

(2) Where the equitable or legal title to a locomotive or locomotive engine is not transferred prior to its being placed into service, the locomotive or locomotive engine ceases to be new when it is placed into service.

(3) With respect to imported locomotives or locomotive engines, the term "new locomotive" or "new locomotive engine" means a locomotive or locomotive engine that is not covered by a certificate of conformity under this part at the time of importation, and that was manufactured or remanufactured after the effective date of the emission standards in this part which is applicable to such locomotive or engine (or which would be applicable to such locomotive or engine had it been manufactured or remanufactured for importation into the United States).

(4) Notwithstanding paragraphs (1) through (3) of this definition, locomotives and locomotive engines which were originally manufactured before January 1, 1973 and which have not been upgraded are not new.

(5) Notwithstanding paragraphs (1) through (3) of this definition, locomotives and locomotive engines which are owned by a small railroad and

which have never been manufactured or remanufactured into a certified configuration are not new.

* * *

**40 C.F.R. §1074.5**

The definitions in this section apply to this part. As used in this part, all undefined terms have the meaning the Act gives to them. The definitions follow:

* * *

New has the following meanings:

(1) For locomotives, new has the meaning given in 40 CFR 1033.901.

(2) For engines used in locomotives, new means an engine incorporated in (or intended to be incorporated in) in a new locomotive.

(3) For other nonroad engines and equipment, new means a domestic or imported nonroad engine or nonroad vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser. Where the equitable or legal title to an engine or vehicle is not transferred to an ultimate purchaser until after the engine or vehicle is placed into service, then the engine or vehicle will no longer be new once it is placed into service. A nonroad engine or vehicle is placed into service when it is used for its functional purposes. This paragraph (3) does not apply to locomotives or engines used in locomotives.

* * *

**40 C.F.R. §1074.10**

(a) States and localities are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new engines smaller than 175 horsepower that are primarily used in farm or construction equipment or vehicles, as defined in this part. For equipment that is used in applications in addition to farming or construction activities, if the equipment is primarily used as farm and/or construction equipment or vehicles (as defined in this part), it is considered farm or construction equipment or vehicles.

(b) For nonroad engines or vehicles other than those described in paragraph (a) of this section and § 1074.12, States and localities are preempted from enforcing any standards or other requirements relating to control of emissions from nonroad engines or vehicles except as provided in subpart B of this part.

**40 C.F.R. §1074.12**

(a) States and localities are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new locomotives and new engines used in locomotives.

(b) During a period equivalent in length to 133 percent of the useful life, expressed as MW-hrs (or miles where applicable), beginning at the point at which the locomotive or engine becomes new, those standards or other requirements which are preempted include, but are not limited to, the following: emission standards, mandatory fleet

average standards, certification requirements, retrofit and aftermarket equipment requirements, and nonfederal in-use testing requirements. The standards and other requirements specified in the preceding sentence are preempted whether applicable to new or other locomotives or locomotive engines.

**40 C.F.R. §1033.901**

* * *

New, when relating to a locomotive or locomotive engine, has the meaning given in paragraph (1) of this definition, except as specified in paragraph (2) of this definition:

(1) A locomotive or engine is new if its equitable or legal title has never been transferred to an ultimate purchaser. Where the equitable or legal title to a locomotive or engine is not transferred prior to its being placed into service, the locomotive or engine ceases to be new when it is placed into service. A locomotive or engine also becomes new if it is remanufactured or refurbished (as defined in this section). A remanufactured locomotive or engine ceases to be new when placed back into service. With respect to imported locomotives or locomotive engines, the term "new locomotive" or "new locomotive engine" also means a locomotive or locomotive engine that is not covered by a certificate of conformity under this part or 40 CFR part 92 at the time of importation, and that was manufactured or remanufactured after the effective date of the emission standards in 40 CFR part 92 which would have been applicable to such locomotive or engine had it been manufactured or remanufactured for

importation into the United States. Note that replacing an engine in one locomotive with an unremanufactured used engine from a different locomotive does not make a locomotive new.

(2) The provisions of paragraph (1) of this definition do not apply for the following cases:

(i) Locomotives and engines that were originally manufactured before January 1, 1973 are not considered to become new when remanufactured unless they have been upgraded (as defined in this section). The provisions of paragraph (1) of this definition apply for locomotives that have been upgraded.

(ii) Locomotives that are owned and operated by a small railroad and that have never been certified (i.e., manufactured or remanufactured into a certified configuration) are not considered to become new when remanufactured. The provisions of paragraph (1) of this definition apply for locomotives that have previously been remanufactured into a certified configuration.

(iii) Locomotives originally certified under § 1033.150(e) do not become new when remanufactured, except as specified in § 1033.615.

(iv) Locomotives that operate only on non-standard gauge rails do not become new when remanufactured if no certified remanufacturing system is available for them.

* * *

**40 C.F.R. pt. 89, App. A**

This appendix sets forth the Environmental Protection Agency's (EPA's) interpretation of the

Clean Air Act regarding the authority of states to regulate the use and operation of nonroad engines.

EPA believes that states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuel; nor are permits regulating such operations precluded, once the engine is no longer new. EPA believes that states are precluded from requiring retrofitting of used nonroad engines except that states are permitted to adopt and enforce any such retrofitting requirements identical to California requirements which have been authorized by EPA under section 209 of the Clean Air Act.

**United States Court of Appeals for the District of Columbia Circuit**

AM. ROAD & TRANSPORTATION BUILDERS ASS'N,

PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RESPONDENTS.

No. 06-1112
Filed: Sept. 12, 2007

## RESPONDENTS' MOTION TO DISMISS FOR MOOTNESS

Pursuant to Federal Rule of Appellate Procedure 27 and Circuit Rule 27, Respondents Stephen L. Johnson and the United States Environmental Protection Agency (collectively "EPA" or "the Agency") hereby request that the Court dismiss American Road and Transportation Builders Association's ("ARTBA") petition on the briefs and without argument in light of recent administrative action taken by EP A that renders this case moot. Based on discussions with counsel for the Petitioner, EP A is informed that Petitioner ARTBA opposes this motion, and Intervenor South Coast Air Quality Management District and Amicus Curiae Clean Air Task Force do not oppose this motion. Counsel for EPA could not ascertain the position of Amicus Curiae State of California on this motion despite efforts to contact counsel by phone and email.

## ARGUMENT

ARTBA filed its petition for review with this Court on March 29, 2006. ARTBA challenges EPA's

alleged constructive denial of, or unreasonable delay in acting on, an administrative rulemaking petition submitted by ARTBA to EPA in 2002. See Pet. Br. at ii ("ARTBA seeks review of EPA's action on ARTBA's petition dated July 12, 2002 as actually or constructively denied, or, alternatively, as action unreasonably delayed."). In its rulemaking petition to the Agency, ARTBA requested that EP A amend certain of its existing regulations governing the preemptive scope of Clean Air Act section 209( e), 42 U.S.C. § 7543( e). Specifically, ARTBA petitioned that "(r)ather than leave air quality planners and the construction industry to the uncertainties and delay of litigation, EP A should commence a rulemaking to amend its Section 209(e) rules. ..." See ARTBA's Petition to Amend Rules Defining the Preemptive Scope of Clean Air Act § 209( e) for Nonroad Vehicles and Engines Other Than Locomotives, JA at 8.

EPA has now commenced a rulemaking on the issues ARTBA raised. On May 18, 2007, EP A published a Notice of Proposed Rulemaking ("notice"), 72 Fed. Reg. 28,098, entitled "Control of Emissions from Nonroad Spark-Ignition Engines and Equipment" (hereinafter "the Bond Amendment rulemaking"). The rulemaking includes several administrative actions, including the proposal of new standards for small and marine spark-ignition nonroad engines. EPA specifically stated in its notice that it would be reviewing ARTBA's petition in the context of the Bond Amendment rulemaking and requested comments from the public on ARTBA's petition. Moreover, EPA stated that the Agency will respond to ARTBA's preemption arguments in its final rule and, if appropriate, make any necessary changes to conform its preemption regulations

accordingly. See 72 Fed. Reg. 28,210 (noting that EPA "will respond to the petition, and if appropriate, make any changes to the regulations to conform our response to ARTBA and other commenters in the final rule."); see also 72 Fed. Reg. 28,209 ("it is appropriate to respond to ARTBA's petition in the context of this rule, while giving the public the ability to respond to provide comments regarding ARTBA's petition.").

By initiating this rulemaking, EPA has taken the administrative action ARTBA requested in its administrative petition and granted ARTBA the only relief, if any, that it could obtain from this Court in the instant petition for review. Because EPA has taken this action, ARTBA's claims before this Court - that EPA has actually or constructively denied its administrative petition, or alternatively, unreasonably delayed taking action on that petition - are without merit and moot. First, given EPA's explicit statement that it will respond to ARTBA's petition and "if appropriate, make any changes to the regulations to conform our response to ARTBA[,]" ARTBA can no longer plausibly maintain that EPA has actually or constructively denied its petition requesting that the Agency commence rulemaking proceedings. 72 Fed. Reg. 28,210. Moreover, any unreasonable delay claim that ARTBA may have asserted regarding EPA's alleged delay in acting on its rulemaking petition is now moot. See In re International Union, United Mine Workers of America, 231 F.3d 51, 54 (D.C. Cir. 2000) ("An agency's notice of proposed rulemaking necessarily moots a petitioner's claim of unreasonable delay if that claim is based upon (1) a period of delay occurring prior to the agency's issuance of a notice of

proposed rulemaking, and (2) a matter that the agency proposes to regulate in that rulemaking.").

Granting EPA's motion to dismiss is appropriate and will promote judicial economy by ensuring that the Court does not expend resources on a matter that is now moot. In contrast, moving forward with consideration of the instant petition for review at the same time that EPA is undertaking its rulemaking could lead to inconsistent rulings, create confusion and uncertainty, and result in the unnecessary expenditure of judicial resources. Moreover, ARTBA suffers no prejudice from proceeding in this manner. First, by commencing rulemaking proceedings, EPA has provided ARTBA with the only relief this Court could have awarded. Additionally, EP A intends to promulgate its final Bond Amendment rule in the summer of 2008, and ARTBA and other regulated entities may seek judicial review of provisions of the Bond Amendment rule at that time pursuant to CAA section 307(b)(1), 42 U.S.C. §7607(b)(1).

## CONCLUSION

For the reasons articulated herein, EPA requests that the Court dismiss ARTBA's petition as moot.

Respectfully submitted,
RONALD J. TENPAS
Acting Assistant Attorney General
*/s/*
CATHERINE M. WANNAMAKER
U.S. Department of Justice

**United States Court of Appeals for the District of Columbia Circuit**

AM. ROAD & TRANSPORTATION BUILDERS ASS'N,

PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RESPONDENTS.

No. 06-1112
Filed: Sept. 13, 2007

**PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE**

In this action, Petitioner American Road & Transportation Builders Association ("ARTBA") seeks review of EPA's actual denial, constructive denial, and (alternatively) unreasonable delay of action on ARTBA's petition to amend or repeal certain rules of Respondent Environmental Protection Agency. ARTBA Br. at ii (Rulings under Review), 1 (Jurisdiction). Now, that Agency and its Administrator (collectively, "EPA") seek this Court's leave to file an untimely motion to dismiss.

ARTBA respectfully submits that the Court should deny EPA leave to file its motion to dismiss because – in addition to coming over 100 days after the notice of proposed rulemaking ("NPRM") on which EPA bases it – the motion to dismiss addresses only unreasonable delay and says nothing about the Court's jurisdiction to hear ARTBA's claims of actual and constructive denial. Because EPA's proffered "dispositive" motion would not

dispose of the litigation, this Court should not waste the parties' time briefing EPA's motion outside of the current scheduling order.

By way of background, on May 22, 2006, EPA filed a timely motion to dismiss for lack of subject matter jurisdiction, which ARTBA opposed based on this Court's jurisdiction over actually and constructively final agency action under 42 U.S.C. §7607(b)(1), and unreasonable delay under the All Writs Act, 28 U.S.C. §1651. By order dated August 24, 2006, the Motions Panel referred the issues raised in EPA's dispositive motion to a Merits Panel. In its briefs filed with this Court, ARTBA again argued for jurisdiction both of actually and constructively final agency action and, alternatively, unreasonably delayed action. *See* ARTBA Br. at 19-20, 21-26; ARTBA Reply Br. at 8-9. In fact, EPA's NPRM does not propose any action on ARTBA's petition. 72 Fed. Reg. 28,209-10 (2007). Certainly, nothing in the NPRM disputes ARTBA's position on actually or constructively final agency action. *See* ARTBA Br. at 21 (*citing Colorado v. Dep't of Interior*, 880 F.2d 481, 485-86 (D.C. Cir. 1989); *Hercules, Inc., v. EPA*, 938 F.2d 276, 282 (D.C. Cir. 1991)).

Because the Motions Panel did not grant EPA's initial dispositive motion with respect to jurisdiction under §7607(b)(1), and because EPA's current dispositive motion concerns only unreasonable delay, EPA's current motion would not, in fact, *dispose* of the entire case. Because it would not dispose of the entire case, there is no reason to brief it at this late date. After oral argument, if the Merits Panel needs further briefing on mootness, the Merits Panel can direct the parties to submit post-hearing briefs.

Significantly, EPA's proffered dispositive motion does not contain any information or argument that EPA could not have included in its notice of supplemental authority on the NPRM, more than 100 days ago. Even if EPA could have satisfied Circuit Rule 27(g)(1)'s good-cause showing when EPA issued its NPRM in May, it cannot satisfy that standard in September.

For the foregoing reasons, petitioner ARTBA respectfully requests that the Court deny EPA's motion for leave to file an untimely motion.

Respectfully submitted,
/s/
Lawrence J. Joseph

**United States Court of Appeals for the District of Columbia Circuit**

AM. ROAD & TRANSPORTATION BUILDERS ASS'N,

PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RESPONDENTS.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,

INTERVENOR.

No. 06-1112
Filed On: Oct. 5, 2007

**BEFORE:** Sentelle and Rogers, *Circuit Judges*, and Edwards, *Senior Circuit Judge*.

**ORDER**

Upon consideration of respondent's motion for leave to file, the lodged motion to dismiss for mootness, and the opposition and reply thereto, it is

**ORDERED** that the motion for leave be granted and the Clerk is directed to file the lodged motion. It is **FURTHER ORDERED** that the motion to dismiss for mootness be granted and this case is hereby dismissed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

*Per Curiam*

**FOR THE COURT:**
Mark J. Langer, Clerk

**United States Court of Appeals**
**for the Ninth Circuit**

NATIONAL ASSOCIATION OF HOME BUILDERS,

PLAINTIFF - APPELLANT,

v.

SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT, ET AL.

DEFENDANTS - APPELLEES.

No. 08-17309
Filed On: May 14, 2009

**AMENDED ORDER**

Appellees' opposed motion to strike portions of the opening brief is granted. Appellant's addendum to the opening brief entitled "Response to the Petition of American Road and Transportation Builders Association to Amend Regulations Regarding the Preemption of State Standards Regulating Emissions From Nonroad Engines" ("ARTBA Response") and all references to the ARTBA Response is hereby stricken.

The answering briefs are due June 8, 2009.

The optional reply brief is due within 14 days after service of the last-served answering brief. See Fed. R. App. P. 31(a)(1).

For the Court:

MOLLY C. DWYER
Clerk of the Court

Lorela Bragado-Sevillena
Deputy Clerk